Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

GRIFFIN INDUSTRIES, INC.,

Petitioner,

v.

TOMMY IRVIN, in his official capacity as Commissioner of the Georgia Department of Agriculture and in his individual capacity, LEE MYERS, in her official capacity as Assistant Commissioner of the Georgia Department of Agriculture and in her individual capacity, GEORGE GORNTO, JOSHUA E. KIGHT, DUBOSE PORTER, and HAROLD REHEIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KEVIN L. MURPHY
GRAYDON HEAD
& RITCHEY LLP
Suite 300
2400 Chamber Center Dr.
Ft. Mitchell, KY 41017
(859) 282-8800

L. LIN WOOD
Counsel of Record
NICOLE JENNINGS WADE
KATHERINE VENTULETT HERNACKI
POWELL GOLDSTEIN LLP
One Atlantic Center
Fourteenth Floor
1201 W. Peachtree St., NW
Atlanta, GA 30309-3488
(404) 572-6600

Attorneys for Petitioner

213660

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

In this case decided on a motion to dismiss, the Eleventh Circuit imposed a heightened pleading standard on the plaintiff in a "class of one" equal protection claim. This virtually insurmountable standard was applied based upon the conclusion that the allegedly unconstitutional conduct involved "multi-dimensional decisions," a conclusion derived from selective portions of documents attached to the complaint. The Eleventh Circuit further held that only factually similar authority may provide fair warning of a constitutional violation for purposes of qualified immunity. The questions presented are:

I. Whether a federal court should apply a heightened pleading standard more stringent than the pleadings requirements of Rule 8(a) of the Federal Rules of Civil Procedure in a "class of one" equal protection claim under 42 U.S.C. § 1983 based upon a factual finding derived from documents attached to the complaint that the decision in question was "multi-dimensional."

II. Whether "fair warning" of a constitutional violation in a "class of one" equal protection claim can be established only by prior cases with "materially similar" facts for purposes of qualified immunity.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Griffin Industries, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioner Griffin Industries, Inc. respectfully seeks a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the United States District Court for the Northern District of Georgia in which it denied qualified immunity to Respondents George Gornto, Joshua Kight, Tommy Irvin, Lee Myers, Harold Reheis & Dubose Porter (collectively "Respondents"), is unreported, but may be found at 2006 WL 783354 (N.D. Ga. Mar. 23, 2006), and is reproduced in the Appendix to this Petition ("App.") at 43a-89a. The initial decision of the Eleventh Circuit is reported at 496 F.3d 1189 (11th Cir. 2007), and is reproduced at App. 1a-42a. The Eleventh Circuit denied panel rehearing and rehearing *en banc* in an order that is reported in table format at __ F.3d __ (11th Cir. Nov. 13, 2007) (Table No. 06-12370AA) and is reproduced at App. 90a.

JURISDICTION

The Eleventh Circuit Court of Appeals entered judgment on August 21, 2007. The Court of Appeals denied panel rehearing and rehearing *en banc* on November 13, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution, U.S. Const. Amend. XIV and 42 U.S.C. § 1983 are reproduced at App. 92a.

STATEMENT OF THE CASE

A. Introduction

This case presents a scenario of vital importance to all citizens and entities subject to governmental regulation. In direct conflict with this Court's precedent, the Eleventh Circuit's opinion blocks virtually all "class of one" equal protection claims within the Eleventh Circuit by requiring a plaintiff to establish the elements of its case prior to obtaining any discovery. With no means of vindication, individuals and entities are essentially stripped of their constitutional rights, at the will and mercy of government acting free of legal consequence. This utter decimation of "class of one" equal protection claims is in direct conflict with this Court's opinion in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), and with the case law from other circuits in which courts have recognized that there is no heightened pleading standard in such cases.

Likewise, the requirement that a plaintiff must present factually identical authority to establish "fair warning" of a constitutional violation renders the possibility of piercing the shield of qualified immunity virtually impossible. The requirement of showing factually similar authority to establish "fair warning" for purposes of qualified immunity is in direct conflict with this Court's opinion in *Hope v. Pelzer*, 536 U.S. 730 (2002). These direct conflicts should be addressed by this Court.

B. Constitutional Background

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It is not necessary for a plaintiff asserting a violation of its equal protection rights to allege that it is a member of a protected class. A plaintiff may successfully bring a "class of one" equal protection claim where the plaintiff alleges that it has been "intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. at 564 (citing *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441, 445 (1923); *Alleghany Pittsburgh Coal Co. v. Comm'n of Webster County*, 488 U.S. 336 (1989)).

In order to overcome a defendant's claim of qualified immunity against a claim for violation of equal protection rights, a plaintiff must first show that a governmental actor violated a constitutional right. *Hope*, 536 U.S. at 736. If a constitutional right has been violated, "the next, sequential step is to ask whether the right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the plaintiff demonstrates that the actor violated a clearly established constitutional right, then qualified immunity from suit does not apply. *Hope*, 536 U.S. at 745.

C. Factual Background

Griffin Industries, Inc. ("Griffin") filed this action on March 11, 2005, asserting claims under 42 U.S.C. § 1983 for violation of its rights to equal protection and due process of law and for conspiracy to violate those constitutional rights.

Griffin is engaged in the business of rendering. Rendering is the process of recycling the inedible parts of slaughtered animals, such as fat, bone and offal, into useful products, such as livestock and poultry feed. Griffin operates two (2) poultry rendering facilities in the State of Georgia, comprising approximately five (5) percent of the state's poultry rendering market. Griffin's primary competitor in Georgia is American Proteins, Inc. ("American Proteins"), which operates three (3) poultry rendering facilities in the State of Georgia. American Proteins' rendering facilities comprise approximately eighty-five (85) to ninety (90) percent of Georgia's poultry rendering market.

Griffin has owned and operated a rendering facility in Laurens County, Georgia, adjacent to the city of East Dublin, Georgia ("the Dublin Facility") since 1981. At the time Griffin purchased and began to operate the Dublin Facility, the area surrounding the plant was rural with few, if any, residences. In the late 1990s, developers, including Respondent George Gornto and business associates of Respondent Dubose Porter, purchased land and erected residential developments near the Dublin Facility. Respondents Gornto and Porter were both prominent political figures in the East Dublin area. At the same time, and at the apparent prompting of

Respondents Gornto and Porter, as well as Defendants the City of East Dublin and Laurens County, the Dublin Facility began to receive an increased number of complaints from surrounding residents regarding odor.[1] This also coincided with Griffin's procurement of additional contracts with significant poultry producers in the State of Georgia.

In its complaint, Griffin alleges that certain state and city governmental officials conspired to harm Griffin's business and shut down the Dublin Facility by subjecting it to disparate and arbitrary environmental and administrative regulation and permitting practices without rational basis. The complaint alleges that Respondents violated, and conspired to violate, Griffin's rights to equal protection and due process of law by undertaking a series of unlawful acts, including: (1) targeted harassment of Griffin; (2) subjecting Griffin to regulatory requirements not required of similarly situated rendering facilities with respect to conditions imposed in Griffin's Clean Air Act Title V Air Permit ("Title V Permit"); and (3) suspending Griffin's Land Application System Permit ("LAS Permit") without notice or hearing, by use of a meritless "Emergency Order."

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1. Additional defendants were named in Griffin's complaint, including Carol Couch, in her official capacity as Director of the Georgia Environmental Protection Division of Georgia, the City of East Dublin, Georgia and Laurens County, Georgia. Claims against these additional defendants were not the subject of the appeal considered by the Eleventh Circuit.

The emergency suspension of the LAS Permit was allegedly based on an isolated test of an on-site well which purported to show nitrate levels in excess of those allowed by law. The emergency suspension of the LAS Permit resulted in a partial shutdown of the Dublin Facility, causing damages to Griffin in excess of Four Hundred Thousand Dollars ($400,000.00). The same standard for the maximum acceptable level of nitrates in wastewater applies uniformly to all rendering companies with LAS Permits. However, Respondents did not seek an emergency suspension of the LAS Permit of American Proteins' plant, despite the fact that tests of the ground water surrounding that facility far exceeded both legal limits and the readings found at Griffin's Dublin Facility. With respect to the emergency suspension, an Administrative Law Judge ("the ALJ") subsequently ruled that: (1) there was no basis for the suspension; and (2) the Environmental Protection Division for the State of Georgia ("EPD") had not imposed similar penalties on similarly situated rendering plants.

Griffin alleged that Respondents subjected it to undue and improper regulatory requirements by imposing arbitrary and capricious requirements and sanctions upon its Dublin Facility without rational basis. Griffin alleged that it had been singled out by Respondents and that other similarly situated rendering facilities operating in Georgia, including its chief competitor, American Proteins, had not been subjected to similar treatment despite the fact that environmental conditions at their facilities were far worse than those at the Griffin facility.

D. The District Court Opinion

The district court granted in part and denied in part the Respondents' various motions to dismiss, for judgment on the pleadings and/or for transfer. *Griffin Indus., Inc. v. Couch*, 2006 WL 783354 (N.D. Ga. Mar. 23, 2006). The district court's opinion is set out in full at App. 43a-89a.

Of primary importance to this petition, the trial court denied the individual Respondents' claims of qualified immunity, holding that Griffin had asserted a valid "class of one" equal protection claim and that Respondents had fair warning that their acts were unconstitutional for purposes of denying qualified immunity. The district court accepted the allegations of Griffin's complaint as true for purposes of the Respondents' 12(b)(6) motions to dismiss. Citing this Court's opinion in *Village of Willowbrook v. Olech*, the trial court held that Griffin had sufficiently alleged that it had been singled out and treated disparately than other similarly situated rendering facilities in Georgia, including its primary competitor, American Proteins. The district court further held that this Court's opinion in *Olech* and the Eleventh Circuit's opinion in *Executive 100, Inc. v. Martin Co.*, 922 F.2d 1536 (11th Cir. 1991), *cert. denied*, 502 U.S. 810 (1991), both of which concerned equal protection violations, provided Respondents with "fair warning" that the conduct alleged by Griffin was unlawful. Thus, the district court denied the Respondents' claim of qualified immunity.

E. The Panel Opinion

The Eleventh Circuit Panel ("the Panel") reversed in part the district court's order and remanded for further proceedings. *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189 (11th Cir. 2007), App. 1a-42a.

The Panel held that Griffin failed to state a "class of one" equal protection claim based on the Panel's determination that Griffin failed to establish that it was "similarly situated to its competitor, American Proteins." Specifically, the Panel held that statements in the ALJ order attached to the complaint established that American Proteins was not similarly situated to Griffin pursuant to a novel and rigorous test applied by the Panel because it urged that this case involved "multi-dimensional decisions." The Panel also held that Griffin had failed to show that the Respondents' actions lacked a rational basis based upon its determination that the exhibits to the complaint "suggest" a possible rational basis for Respondents' actions.

The Panel further held that Griffin had not established that Respondents had "fair warning" that their actions were unconstitutional because Griffin had not provided precedent to show a violation of clearly established law that involved a similar factual situation.

Based upon its determination that the allegedly unconstitutional decision was "multi-dimensional," the Panel did not accept the allegations of Griffin's complaint as true for purposes of the Respondents' motions to dismiss, but instead held Griffin to the higher standard of having to prove the elements of its claims and simultaneously refute any potential defenses against those claims – all without the benefit of any discovery.

REASONS FOR GRANTING THE PETITION

Griffin's petition provides this Court with an opportunity to preserve the rights of individuals and entities to pursue "class of one" equal protection claims in keeping with the holdings and principles enunciated by this Court. The lower courts have wrestled with this Court's opinion in *Village of Willowbrook v. Olech* since it was issued in 2000, with 3,989 opinions citing this three (3) page decision.[2] The Panel's decision, in which it adopted a novel test for analyzing and deciding "class of one" equal protection claims under 42 U.S.C. § 1983 at the motion to dismiss stage, personifies the confusion that characterizes the post-*Olech* landscape. The Panel's decision radically departs from Supreme Court precedent, as well as the case law of other circuits and the Eleventh Circuit itself, by imposing a heightened pleading standard for "class of one" claims under certain circumstances. The Panel's decision virtually extinguishes all "class of one" cases in the Eleventh Circuit and creates an opportunity for other circuits to block such claims elsewhere. Review should be granted to correct this grave consequence. This case presents this Court with an opportunity to revisit the *Olech* decision, preserve its integrity and define the contours of the "class of one" equal protection claim.

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2. *See, e.g., Jennings v. City of Stillwater*, 383 F.3d 1199, 1210-11 (10th Cir. 2004) (noting that "[i]n the wake of *Olech*, the lower courts have struggled to define the contours of class-of-one cases," and that commentators have similarly struggled to define the parameters of *Olech*) (internal citations omitted).

This petition also presents the important question of whether a plaintiff must present factually similar authority in order to demonstrate that a constitutional right was clearly established sufficient to strip governmental actors of immunity. Griffin submits that the Eleventh Circuit's opinion directly conflicts with this Court's decision in *Hope v. Pelzer*, in which this Court rejected prior case law holding that before a precedent could give a defendant "fair warning," such precedent had to have "materially similar" facts to the decision at issue.

I. THE PANEL'S STANDARD FOR CONSIDERING "CLASS OF ONE" EQUAL PROTECTION CLAIMS CONFLICTS WITH THE DECISIONS OF THIS COURT AND DECISIONS OF THE ELEVENTH CIRCUIT.

The Panel's novel "multi-dimensional decisions" standard for addressing "class of one" equal protection cases directly conflicts with decisions of this Court, the Eleventh Circuit and other circuits. The Panel decision essentially writes *Olech* out of the law by ending virtually all plaintiffs' ability to pursue "class of one" cases in the Eleventh Circuit. The novel approach marks a radical departure from the pleadings standard set forth by this Court and the Eleventh Circuit and sets a dangerous precedent. This Court should grant certiorari in order to address this important conflict.

A. In *Olech*, This Court Did Not Hold That Analysis Of The Nature Of The Governmental Decision In A "Class Of One" Equal Protection Claim Was Appropriate In Adjudicating A Motion To Dismiss.

This Court held in *Olech* that a plaintiff states a claim for a constitutional violation for a "class of one" where she alleges that she has been treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000). The Court's opinion in *Olech* does not contain any analysis of the nature of the governmental decision that was being made in that case or the factors that were being considered by the government actor.

The plaintiff in *Olech* stated a claim by alleging in her amended complaint that the defendant demanded a larger easement from her than it did from "similarly situated property owners" and that the demand "was 'irrational and wholly arbitrary.'" *Id.* The plaintiff's amended complaint in that case alleged that the defendant Village of Willowbrook demanded a 33-foot easement as a condition to connecting her property to the municipal water supply when the Village had demanded only a 15-foot easement from other similarly situated property owners. *Id.* at 565. The plaintiff's amended complaint further alleged that the Village's demand was irrational and wholly arbitrary. *Id.*

The defendant Village argued that the plaintiff failed to state a claim because certain allegations in the plaintiff's amended complaint demonstrated a rational

basis for the demand for a larger easement in conjunction with connecting the plaintiff's residence to the municipal water supply. Specifically, the amended complaint alleged that the purported reason for the larger easement was that it was necessary in connection with proposed improvement of the infrastructure of the road. *See* Petition for Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit filed by Petitioner Village of Willowbrook, 1999 WL 33609285, at *18 (Feb. 10, 1999).

This Court accepted as true for the purpose of the motion to dismiss Olech's allegations that there were similarly situated property owners and that there was no rational basis for the Village's disparate demand upon her. This Court did not address the factors that would be considered by the Village in making the decision regarding the necessary size of the easement. Although the plaintiff had pled in her complaint the Village's purported rational basis for drawing a distinction between her and other property owners, this Court refused to conduct a fact-finding inquiry at the motion to dismiss stage to determine whether the plaintiff was *actually* similarly situated or whether there was *actually* a rational basis for the decision in question. It was sufficient that plaintiff had pled both of these elements.

In the case before this Court, the Panel summarily decided that the decision at issue in *Olech* was "one-dimensional" because the only issue was the size of the easement necessary to connect to the water supply. However, Olech's own amended complaint demonstrated that at least one potentially differentiating factor – specifically the need for more space to improve

infrastructure – was purportedly being considered as part of the decision on the size of the easement necessary to connect to the water supply. The Panel ignored the plain language in *Olech* and instead applied a heightened pleading standard based on its determination that the alleged unconstitutional decisions at issue were "multi-dimensional" in nature. Griffin submits, however, that the application of the "multi-dimensional" analysis is a red herring. The Panel's new standard is simply another way to employ the summary judgment standard at the motion to dismiss stage, and it is therefore contrary to this Court's ruling in *Olech*.

B. There Is No Precedent For The Novel Application At The Motion To Dismiss Stage Of A Heightened Pleading Standard For "Multi-Dimensional" Governmental Decisions.

The Panel cited no authority to support its position that it is acceptable to consider the various factors that might go into a governmental decision at the motion to dismiss stage. Instead, the only authorities cited by the Panel as precedent for this new approach were cases addressing summary judgment or post-trial issues. In these summary judgment and post-trial cases, the facts had been sufficiently developed to determine whether parties were similarly situated or whether government actors had acted without rational basis. *See Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 559 (2006) ("similarly situated" analysis conducted post-jury verdict); *Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1316-19 (11th Cir. 2003) (summary judgment); *Purze v. Village of Winthrop Harbor*, 286 F.3d 452 (7th Cir. 2002) (summary

judgment); *McDonald v. Village of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004) (summary judgment); *Hicks v. Jackson County Comm'n*, 374 F. Supp. 2d 1084, 1096 (N.D. Ala. 2005) (summary judgment).

The Panel's "multi-dimensional decisions" standard conflicts with the analysis in *Olech* as well as the authority upon which *Olech* rested. In *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441 (1923), for example, this Court allowed a claim for an equal protection violation to proceed at its initial stage, where the plaintiff plainly alleged that it had been treated differently than other property owners. *Id.* at 447. Far from involving a simple, one-dimensional set of decisions, *Sioux City* involved the question of whether both state and county authorities properly taxed a portion of a bridge that spanned two states. *Id.* at 442. The bridge in *Sioux City* not only spanned two states, but also was leased by two different railroads, was too light for modern traffic and had been improved. *Id.* Despite the unique features of the subject bridge, this Court held that the allegation that the bridge was subject to a higher tax rate than other properties (both similar and dissimilar) in the area stated a threshold claim of an equal protection violation. *Id.* at 446-47. Most importantly, this Court *assumed* discrimination, but left for another day the question of whether discrimination had actually occurred:

> It is therefore just that upon reversal we should remand the case for a further hearing upon the issue of discrimination, inviting attention to the well-established rule in the decisions of this court, cited above, that mere

> errors of judgment do not support a claim of discrimination, but that there must be something more — something which in effect amounts to an intentional violation of the essential principle of practical uniformity.

Id. at 447 (citing *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 353 (1918)).

Despite the fact that the *Sioux City* case involved multiple decisions based on multiple factors, this Court applied the proper analysis in assuming the plaintiff's allegations as true and leaving for another day the determination of actual discrimination. The Panel, however, referred to this Court's opinion in *Sioux City* and its prior decision in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336 (1989), as being " ' as far removed from the pantheon of influential equal protection cases as one could imagine.' " App. at 22a (quoting Robert C. Farrell, *Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech*, 78 Wash. L. Rev. 367, 394 (2003)). The Panel distinguished the *Sioux City* opinion as involving a "single answer to a single question . . . the market value of the property." App. at 25a. However, it is clear that, despite the apparent multiplicity of factors at issue in the *Sioux City* case, this Court accepted the plaintiff's allegations of unequal treatment and delayed summary determination until after discovery.

Prior to the Panel's decision in this case, another panel of the Eleventh Circuit held that "class of one" cases may proceed past the Rule 12(b)(6) stage on the basis of "general" allegations. *Exec. 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir. 1991), *cert. denied*, 502 U.S. 810 (1991). In *Exec. 100*, the Eleventh Circuit reversed a lower court dismissal of a "class of one" claim, holding that "the plaintiffs state an as applied equal protection claim" where "[t]he plaintiffs allege that the defendants treated them differently from other similarly situated landowners . . . without any reasonable basis." *Id.* at 1541. The Eleventh Circuit accepted the allegations of plaintiffs as true, as it was required to do, and did not engage in an analysis of the nature of the decision being challenged in that case. *Id.* at 1539.

Other circuits have similarly held that a "class of one" equal protection claim survives a motion to dismiss on the pleaded facts. *See Crowley v. McKinney*, 400 F.3d 965, 971-72 (7th Cir. 2005) (dismissal of "class of one" claim at Rule 12(b)(6) stage was premature when general allegations of similarity and impermissible motive were made in complaint); *DeMuria v. Hawkes*, 328 F.3d 704, 707 (2d Cir. 2003) (general allegations sufficient to pass Rule 12(b)(6) analysis in consideration of *Olech*). At least two circuits have specifically recognized the distinction between the pleading requirements for a motion to dismiss and for a motion for summary judgment with respect to the "similarly situated" prong of a "class of one" claim. *See TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 788 (6th Cir. 2005) (distinguishing a case reversing the dismissal of a "class of one" claim because "in reviewing the district court's award of summary judgment, we are not bound by the 'decidedly liberal'

standard of review applied to a complaint challenged under Rule 12(b)(6)"). The Tenth Circuit held that:

> *Because the Supreme Court considered Olech on a motion to dismiss, it had nothing more than an allegation that the plaintiff was similarly situated to others.* Since then, appellate courts have examined *Olech* claims at the summary judgment stage, where the factual record is more thoroughly developed. In such cases, courts have insisted that plaintiffs demonstrate similarity in all material respects.

Jicarilla Apache Nation v. Rio Arriba County, 440 F.3d 1202, 1212 (10th Cir. 2006) (emphasis added).

C. Circuit Courts Are Imposing Different Standards In "Class Of One" Equal Protection Cases.

As discussed *supra*, several circuit opinions have recognized that *Olech* does not provide for a heightened pleading standard in "class of one" claims. However, one recent appellate decision raises the question of whether other circuits will also impose requirements in "class of one" claims not permitted by this Court pursuant to its decision in *Olech*.

The Sixth Circuit recently applied a constrained analysis similar to the Panel's decision when it pierced the pleadings to find that plaintiffs had failed to state a "class of one" claim where it assumed that defendants had not been treated differently than others and that a rational basis existed for the complained of action. *Ass'n of*

Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 550 (6th Cir. 2007). The dissent in *Cleveland Fire Fighters* highlighted the very issue presented by this petition by noting the Sixth Circuit panel's failure to adhere to *Olech*:

> In my view, however, the *Olech* decision should carry far more weight in our decision today than the majority acknowledges. . . .
>
> . . . Like Olech's complaint, the complaint here can "fairly be construed" as alleging that the City of Cleveland intentionally denied residency exemptions to [plaintiffs] though the City granted exemptions to other similarly situated employees. . . . These allegations are sufficient to state a claim for relief under *Olech*.

Id. at 554 (Moore, C.J., concurring in part and dissenting in part).

The Panel's decision, as well as the Sixth Circuit's *Cleveland Fire Fighters* decision, provides support for other circuits to ignore the plain language in *Olech* and instead impose such stringent requirements upon plaintiffs that it will be virtually impossible to assert a claim for violation of equal protection in a "class of one" case. This Court should grant review in this case to address this issue of significant importance.

D. The Panel Ignored Precedent From This Court Outlining The Pleading Standard For Cases Involving Alleged Constitutional Violations.

The Panel decision in this case, like the *Cleveland Fire Fighters* decision discussed *supra*, conflicts with the notice pleading standards applicable to a Rule 12 motion to dismiss as enunciated by this Court. Indeed, this Court's decisions have been clear that "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). In *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), this Court held that the pleading specificity standard "does not impose a probability requirement at the pleading stage" but instead "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" supporting the claim. *Id.* at 1959. Thus, it is sufficient if the complaint "identifies facts that are suggestive enough to render [the claim] plausible." *Id.* at 1965.

This Court most recently addressed the pleadings standard in the constitutional context in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (*per curiam*). In *Erickson*, a prisoner brought a Section 1983 claim against prison medical officials, alleging deliberate indifference to his medical needs in violation of his Eighth Amendment rights. *Id.* at 2198. The Tenth Circuit affirmed the district court's dismissal in *Erickson* based on its conclusion that the plaintiff had made "only conclusory allegations to the effect that he has suffered a cognizable independent harm. . . ." *Id.* at 2199. This Court, however, found that the plaintiff had sufficiently pleaded harm and that

"it was error for the Court of Appeals to conclude that the allegations in question . . . were too conclusory to establish for pleading purposes that petitioner had suffered 'a cognizable independent harm'. . . ." *Id.* at 2200. This Court further held:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only " 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, *supra*, *quoting Conley v. Gibson*, 255 U.S. 41, 47 (1957). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all factual allegations contained in the complaint.

Id.

Moreover, this Court has repeatedly held that heightened pleading and evidentiary standards are inappropriate in Section 1983 cases. In *Gomez v. Toledo*, 446 U.S. 635 (1980), this Court addressed whether, in a Section 1983 case against a public official who may be entitled to immunity, a plaintiff must plead allegations in anticipation of the affirmative defense of qualified immunity. *Id.* at 635-36. This Court first reaffirmed that:

> [t]wo and only two allegations are required in order to state a cause of action under [Section 1983]. First, the plaintiff must allege that some person has deprived him of a federal right.

> Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Id. at 640. The Court in *Gomez* then refused to force a plaintiff to adhere to a heightened pleadings standard to address the anticipated defense of qualified immunity. *Id.* at 641.

In *Crawford-El v. Britton*, 523 U.S. 574 (1998), this Court considered whether federal courts should apply a heightened evidentiary standard in Section 1983 unconstitutional motive cases. *Id.* at 577. The Court refused to impose such a standard and noted that "we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense." *Id.* at 595. The Court further explained that "questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process." *Id. See also Leatherman v. Tarrant County Narcotics Intelligence Coordination Unit*, 507 U.S. 163, 168 (1993) (refusing to allow heightened pleading standard in Section 1983 civil rights action against municipality); *Hill v. McDonough*, 547 U.S. 573 (2006) (noting in connection with a Section 1983 case that "[i]mposition of a heightened pleading standard is quite a different matter. Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts.").

The Panel opinion reversed the inquiry mandated by this Court in *Erickson* and its predecessors and held that Griffin's claim should be dismissed because "[t]he complaint is filled with facts that suggest a rational basis for the defendant's [sic] actions." The novel test applied by the Panel violated well-established precedent by construing the allegations against Griffin and by imposing upon Griffin a heightened pleading standard. The Panel unjustifiably assumed that because certain allegations were not supported, Griffin would not be able to obtain evidence to support those facts.

E. The Panel's Application Of Fed. R. Civ. P. 10(c) Conflicts With Decisions From Other Circuits.

This Court has never interpreted Rule 10(c) to determine the precise treatment to be given to attachments in considering a motion to dismiss, but the appellate courts have issued various contradictory rulings on this issue.

The Eleventh Circuit has held that all facts contained in the attachments to the complaint must be considered to be true, and applying that standard, the Panel determined that Griffin had "pled too much." Most prominently, the Panel construed statements in the ALJ order as contradicting allegations in Griffin's complaint. Moreover, the Panel did not merely consider these facts to be true – the Panel considered the facts contained in the attachments to be the *only* evidence that might ever be adduced on certain points.

Other circuits have held clearly that Rule 10(c) does not require a plaintiff to adopt as true all facts in

attachments to a complaint. *See, e.g., Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 674-75 (2d Cir. 1995) (holding that it "is not a proper reading of the rule" to contend that "Rule 10(c) requires a plaintiff to adopt as true the full contents of any document attached to a complaint or adopted by reference"); *Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 455-56 (7th Cir. 1998) ("When the exhibit, however, is not the subject of the claim, Rule 10(c) does not require a plaintiff to adopt every word within the exhibits as true for purposes of pleading simply because the documents were attached to the complaint to support an alleged fact.").

The reasoning of the Second and Seventh Circuits is more sound than that of the Eleventh Circuit on this point. It would be unfair to force a plaintiff to adopt as true each and every fact contained in any attachment to a complaint. In many instances, evidence developed during discovery could disprove facts contained in an attachment. For example, in a defamation case, the plaintiff plainly disavows certain statements contained in attached articles which are alleged to be defamatory. Certainly just because a statement is made in an attachment does not mean that the fact has been conclusively established and cannot be disproved by other evidence. Moreover, a plaintiff should not be punished – as Griffin was in this case – because it attached documents in an attempt to support its factual allegations in the complaint.

Regardless of the interpretation of Rule 10(c), the statements in the ALJ order support, and do not contradict, Griffin's allegations. Therefore, the order

cannot possibly be construed to "reveal facts which foreclose recovery as a matter of law." *See Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974).

F. Griffin Properly Pled A Claim For An Equal Protection Violation.

In this case, the Panel improperly decided at the pleading stage, contrary to direct allegations in the complaint, that the government decisions at issue in this case were "multi-dimensional." The facts as alleged, however, show that the basis for Griffin's discriminatory treatment claim involved a single answer to the single question of whether conditions at Griffin's Dublin Facility posed an emergency requiring action to shut down the plant, without warning, by suspending the LAS Permit. The same standard for the maximum acceptable level of nitrates in wastewater applies uniformly to all rendering companies with LAS Permits. Yet while the EPD suspended Griffin's LAS Permit based on isolated readings of water in one on-site test well, the same action was not taken with respect to Griffin's competitor whose water readings far exceeded the legal limits for an extended duration of time. Griffin has alleged that there was no rational basis for treating the two competitors differently in determining whether the purportedly high levels of nitrates posed a threat to human health.

These specific allegations, along with the general allegations that Griffin and American Proteins were similarly situated, easily satisfy the pleading standards set forth in *Olech* and *Twombly*. The Panel decision radically departed from this Court's holdings and from

the interpretation of *Olech* by other courts to impose a summary judgment standard on Griffin's complaint in ruling on a motion to dismiss.

Nothing in the ALJ's ruling directly contradicts and forecloses proof of the allegations in the complaint. Although certain statements in certain of the attachments to Griffin's complaint could arguably support Respondents' argument that Griffin and its competitors were not similarly situated, those statements are not the only possible evidence on this point. To the contrary, other statements in the same attachments support Griffin's allegations that Griffin and its competitors are similarly situated. Moreover, Griffin can introduce substantial evidence – and would have done so prior to the summary judgment stage – supporting its contention that it is similarly situated with its competitors. The Panel improperly held not only that all statements in the attachments were true but also that certain statements constituted conclusive evidence on the point in question.

The Panel's novel "multi-dimensional decisions" test requires district courts to make a factual determination at the notice pleading stage regarding whether a decision is multi-dimensional without having the benefit of the factual record developed through discovery. This new standard runs the significant risk that the court's assumption – as it was here – will be incorrect. This novel test conflicts with the requirements set forth by the Court in *Olech* for pleading a "class of one" claim and conflicts with decisions rendered by the Eleventh Circuit and other circuits.

II. THE ELEVENTH CIRCUIT'S REQUIREMENT OF FACTUALLY SIMILAR AUTHORITY TO ESTABLISH FAIR WARNING OF AN EQUAL PROTECTION VIOLATION FOR PURPOSES OF QUALIFIED IMMUNITY CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE ELEVENTH CIRCUIT.

The Panel improperly held that *Olech* and *Executive 100* did not give Respondents "fair warning" that their actions were unconstitutional, because the Panel required the cases to be very similar factually in violation of the Supreme Court's holding in *Hope v. Pelzer*, 536 U.S. 730 (2002).

A. This Court's Opinion In *Hope* Eliminated The Requirement That Prior Case Law Must Be "Substantially Similar" In Order To Place A Defendant On Notice That His Behavior Is Unconstitutional.

The qualified immunity defense requires courts to enter judgment in favor of a government employee unless the employee's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, 533 U.S. 194, 200 (2001), this Court held that lower courts' "first inquiry must be whether a constitutional right would have been violated on the facts alleged." Only if there is a constitutional violation can lower courts proceed to consider whether the official is entitled to qualified immunity. *Id.* at 201. For a right to be clearly established, "[t]he contours of the right must be

sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In light of pre-existing law, "the unlawfulness must be apparent." *Id.* at 640.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), this Court rejected prior case law requiring "materially similar" authority in order to give a defendant "fair warning" that his conduct was violative of the Constitution. *Hope* involved the issue of whether punishment in the form of tying a prisoner to a hitching post violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 733. Finding no authority directly on point to provide "fair warning" under a materially similar set of facts, this Court opined that

> general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful."

Id. at 741 (quoting *Anderson*, 483 U.S. at 640). Citing this Court's previous opinion in *United States v. Lanier*, 520 U.S. 259 (1997), the Court held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, we expressly rejected a requirement that previous cases be 'fundamentally similar.'" *Hope*, 536 U.S. at 741. Therefore, "the salient question" is "whether the state

of the law" at the time of violation "gave respondents fair warning that their alleged treatment . . . was unconstitutional." *Id.*

In *Hope*, this Court found that the use of a hitching post "unnecessarily and wantonly inflicted pain," and thus constituted a clear violation of the Eighth Amendment. *Id.* Indeed, this Court found the violation to be "so obvious" that the Court's own cases, albeit not factually similar, gave the respondents fair warning that their conduct was unconstitutional. *Id.*

This Court has recognized for at least 85 years that an equal protection violation occurs when government actors treat a plaintiff differently than those similarly situated without rational basis. *See Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. at 445. This fact was recognized and reaffirmed in *Olech* when this Court held specifically:

> Our cases have recognized successful equal protection claims brought by a "class of one" where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment.

Olech, 528 U.S. at 564 (citing *Sioux City*, 260 U.S. at 441; *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 336).

Prior to the Panel's decision in this case, the Eleventh Circuit explicitly recognized the "class of one" equal protection claim where an individual was intentionally treated differently than others similarly

situated. In *Exec. 100, Inc. v. Martin County*, discussed *supra*, the Eleventh Circuit reversed a lower court dismissal of a "class of one" claim, holding that "the plaintiffs state an as applied equal protection claim" where "[t]he plaintiffs allege that the defendants treated them differently from other similarly situated landowners . . . without any reasonable basis." *Exec. 100*, 922 F.2d at 1541.

The Eleventh Circuit has previously acknowledged that after this Court's decision in *Hope*, it is not required to search for factually similar authority in order to find "fair warning" for purposes of qualified immunity. *See Akins v. Fulton County, Ga.*, 420 F.3d 1293, 1307 (11th Cir. 2005) ("Post-*Hope*, as instructed by the Supreme Court, we are compelled to engage in a different analysis."), *cert. denied sub nom., Gates v. Akins*, 546 U.S. 1095 (2006); *Mercado v. City of Orlando*, 407 F.3d 1152, 115 (11th Cir. 2005) ("The 'reasoning, though not the holding' of prior cases can also 'send the same message to reasonable officers' in novel factual situations.") (quoting *Hope*, 536 U.S. at 743).

Contrary to the rulings of this Court, as well as its own precedent, the Panel in this case effectively used a pre-*Hope* analysis when it held that existing "class of one" decisions could never provide a "broad principle of law" placing government actors on notice that they cannot discriminate against a plaintiff because the "precise facts of a case are critical in evaluating a 'class of one' claim." App. at 39a. The Panel's decision indicates that because its new analysis for "class of one" cases is so fact-intensive, only cases with "materially similar facts" can provide government actors "fair warning" that

their actions are unconstitutional. This holding is in direct conflict with the mandate in *Hope* that a case does not need to address "materially similar facts" to give a public official "fair warning" that his or her conduct is unconstitutional.

B. In Contrast To The Panel's Decision, The Second Circuit Has Held That Equal Protection Violations In "Class Of One" Cases Were "Clearly Established" By *Olech*.

In contrast with the Panel decision, the Second Circuit has held that the *Olech* opinion made the "class of one" equal protection violation "well established" for purposes of qualified immunity in a number of different factual circumstances.

In *Cobb v. Pozzi*, 363 F.3d 89 (2d Cir. 2004), the Second Circuit held that *Olech*-based equal protection principles were "clearly established" for purposes of qualified immunity. *Id.* at 111. The *Pozzi* court examined whether corrections department officials alleged to have retaliated against the plaintiff corrections officers because of their association with the union were entitled to qualified immunity. *Id.* at 92-93, 111. The *Pozzi* defendants argued that they were entitled to qualified immunity based on the argument that "the equal protection principles articulated in *Olech* were not clearly established law at the time of the alleged unconstitutional conduct at issue," and that they "treated the [plaintiffs] in a manner that was objectively reasonable." *Id.* at 111. Despite the fact that the conduct at issue pre-dated *Olech*, the Second Circuit nevertheless

found that the "class of one" equal protection claim was simply *reaffirmed* by *Olech*:

> We reject these arguments. First, the law pertaining to "class of one" equal protection claims was clearly established in 1999. As we recently noted . . . the Supreme Court did not depart from well settled equal protection principles in *Olech*. Rather, the *Olech* Court merely "reaffirmed" that "equal protection claims can be brought by a class of one." As the Supreme Court underscored in *Olech*, the Court has long "recognized successful equal protection claims brought by a 'class of one' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."

Pozzi, 363 F.3d at 111 (citing *Olech*, 528 U.S. at 564 ("citing cases stretching back to 1923")).

The *Pozzi* court denied qualified immunity based on the well-established principles reaffirmed in *Olech*, despite the fact that *Olech* concerned an entirely different and distinguishable factual scenario. *Id.* at 111-12. *See also Mimics, Inc. v. Village of Angel Fire*, 394 F.3d 836, 849 n.8 (10th Cir. 2005) (finding equal protection violation where plaintiff alleged that building inspector and village officials "singled [plaintiff's business] out" and "treated [plaintiff] differently" than other similarly situated business, but granting qualified immunity only because conduct pre-dated *Olech*: "In *Village of*

Willowbrook v. Olech, the Supreme Court definitively established the availability of an equal protection claim brought by a "class of one.").

Under this Court's authority, the authority of the Eleventh Circuit and other circuit courts, Respondents had "fair warning" that the Constitution is violated when a public official "intentionally treat[s] [the plaintiff] differently from others similarly situated and [] there is no rational basis for the difference in treatment." *Olech*, 528 U.S. at 564. Thus, the decisions in *Olech* and *Executive 100* gave Respondents "fair warning" that it is unconstitutional to apply the same regulations differently to similarly situated entities.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

L. LIN WOOD
Counsel of Record
NICOLE JENNINGS WADE
KATHERINE VENTULETT HERNACKI
POWELL GOLDSTEIN LLP
One Atlantic Center
Fourteenth Floor
1201 W. Peachtree St., NW
Atlanta, GA 30309-3488
(404) 572-6600

KEVIN L. MURPHY
GRAYDON HEAD
& RITCHEY LLP
Suite 300
2400 Chamber Center Dr.
Ft. Mitchell, KY 41017
(859) 282-8800

Attorneys for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 21, 2007

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-12370

D.C. Docket No. 05-00684-CV-WSD-1

GRIFFIN INDUSTRIES, INC.,

Plaintiff-Appellee,

versus

TOMMY IRVIN, in his official capacity as Commissioner of the Georgia Department of Agriculture and in his individual capacity, LEE MYERS, in his official capacity as Commissioner of the Georgia Department of Agriculture and in his individual capacity, et al.,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Georgia

(August 21, 2007)

Appendix A

Before HULL and MARCUS, Circuit Judges, and BARZILAY,* Judge.

MARCUS, Circuit Judge:

This unusual civil rights case presents the question, on interlocutory appeal, whether the defendants, who are state environmental regulators and local political actors, may be held liable for violations of the Equal Protection Clause for taking regulatory action against an industrial facility. Griffin Industries, which owns a chicken rendering plant in East Dublin, Georgia, brought a section 1983 suit against various state and local defendants on the theory that the defendants violated its constitutional right to equal protection by "disparately treat[ing] and disparately regulat [ing] Griffin Industries in a way that its competitors . . . are not treated or regulated." Compl. ¶ 20. After careful review, we reverse the district court's order denying the defendants' motions to dismiss and hold that the defendants were entitled to qualified immunity.

I. BACKGROUND

When we review the district court's denial of qualified immunity at the motion to dismiss stage, we accept, as we must, the factual allegations in the complaint as true and draw all reasonable inferences therefrom in the plaintiff's favor. *Dacosta v.*

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* Honorable Judith M. Barzilay, Judge, United States Court of International Trade, sitting by designation.

Nwachukwa, 304 F.3d 1045, 1047 (11th Cir.2002). With this standard in mind, we provide the factual background of the case before proceeding to outline the specific allegations Griffin made against the individual defendants.

A. Factual Overview

Griffin Industries, Inc., a Kentucky corporation, owns a chicken rendering plant in East Dublin, Georgia, a town in east-central Georgia about halfway between Atlanta and Savannah. The East Dublin facility processes animal waste products such as chicken feathers, bones, blood, grease, and carcasses into commercial products used in animal feeds, cosmetics, fertilizers, and other products. Griffin has owned the facility since 1981.

Beginning in the late 1990s, the plant saw a substantial increase in the number of odor complaints coming from local residents. More people had moved into the area near the plant, and Griffin had entered into contracts with significant poultry producers in the state, increasing the plant's rendering volume. According to Griffin's complaint, local officials including East Dublin Mayor George Gornto and attorney Joshua Kight then began trying to limit or end rendering operations at the plant. Specifically, Griffin claimed that the defendants encouraged residents and businesses to file odor complaints against Griffin, required the plant to participate in an odor study conducted by the Georgia Institute of Technology, published editorials attacking

Griffin in the local newspaper, and utilized the East Dublin Police Department to intimidate and harass the company.

Griffin said that these efforts intensified in 2002, when state regulators at the Georgia Department of Agriculture (GDA) and the Environmental Protection Division (EPD) of the Georgia Department of National Resources became involved in a conspiracy against it. Griffin alleged that EPD Director Harold Reheis, GDA Commissioner Tommy Irvin, and GDA Assistant Commissioner Lee Myers joined Gornto and Kight in the conspiracy. Dubose Porter, who represented the district including East Dublin in the Georgia General Assembly and is co-owner and editor of the Dublin *Courier-Herald*, was also alleged to have participated.

On August 6, 2002, the EPD issued a draft permit for the Griffin facility pursuant to Title V of the Clean Air Act, 42 U.S.C. §§ 7661-7661f.[1] Griffin objected to

1. Title V permits are generally issued by state authorities acting pursuant to the Federal Clean Air Act. According to the United States Environmental Protection Agency (EPA), the "purpose of Title V permits is to reduce violations of air pollution laws and improve enforcement of those laws" by (1) "recording in one document all of the air pollution control requirements that apply to the source," (2) "requiring the source to make regular reports on how it is tracking its emissions of pollution and the controls it is using to limit its emissions," (3) "adding monitoring, testing, or record keeping requirements, where needed to assure that the source complies with its emission limits or other pollution control requirements," (4) "requiring the source to certify each

(Cont'd)

certain aspects of the draft Title V permit, and EPD and Griffin negotiated over the permit that fall. Griffin and the EPD eventually reached voluntary agreement on the permit on October 29, 2002, just prior to a public hearing. At the hearing, however, local officials strongly objected to the draft permit and pushed for stronger odor regulations. Subsequent Title V permit drafts were issued on September 9, 2003, and December 24, 2003. According to Griffin, the December 24 permit contained new odor control provisions more stringent than those imposed on any other chicken rendering facility in the state.

In addition to the air quality regulations in the Title V permit, the Griffin plant is subject to water quality controls. Wastewater generated at the plant during the rendering process is pumped through a series of ponds or lagoons for purification and then sprayed onto an irrigation field through a land application system (LAS). This LAS is operated under a permit from the EPD that requires Griffin to track and record the timing and volume of sprays, along with the quality of the water being sprayed on the field. There are prohibitions on spraying when the field is saturated to prevent water from running off into local streams, and testing of the underlying groundwater through monitoring wells is also required.

(Cont'd)

year whether or not it has met the air pollution requirements in its title V permit," and (5) "making the terms of the title V permit federally enforceable." *See* EPA, Air Permits: Basic Facts, at *http://www.epa.gov/air/oaqps/permits/*.

Appendix A

In May 2000, the EPD issued Griffin a new LAS permit that allowed Griffin to triple the volume of water sprayed on the field. On March 14, 2003, however, the EPD issued an "emergency order" suspending this permit. Griffin challenged the suspension in proceedings before a state administrative law judge. According to the complaint and its attachments, the judge found that the EPD had established "that numerous events occurring around the first part of 2003 made it suspect for the first time that there might be problems with the operation of East Dublin's LAS and with the reliability of the data which it had received in the past from the East Dublin plant." Compl. Ex. U at 9. While acknowledging that these events gave rise to "unanswered questions" regarding the operation of Griffin's land application system, the administrative judge concluded that the EPD had failed to prove, by a preponderance of the evidence, that the suspension order was justified by a "substantial and imminent threat" to water quality or public health. *Id.* at 9-10. Accordingly, the judge revoked the EPD's emergency order suspending Griffin's LAS permit on April 29, 2003.

Griffin alleged that the defendants have nevertheless continued to discriminate against the plant since the revocation of the emergency order, "harassing it and . . . imposing additional burdens on Griffin industries that are not imposed on similarly situated rendering facilities," "selectively and maliciously prosecut[ing] Griffin Industries," and "depriving Griffin Industries of its property rights." Compl. ¶¶ 100-02.

B. Alleged Conduct of Specific Defendants

Griffin brought this section 1983 suit against a group of state and local officials on March 11, 2005. The defendants involved in this interlocutory appeal,[2] and the factual allegations pertaining to each of them, are detailed below.

1. *George Gornto*

George Gornto is the mayor of the City of East Dublin. Griffin claimed that Gornto hoped to "curry political favor" and increase the value of real estate he owned near the Griffin plant by working to shut it down. Specifically, Gornto was said to have pushed East Dublin residents to file odor complaints against Griffin; pressured state regulators to act against the plant; engaged a lawyer, Joshua Kight, to pursue legal remedies against Griffin; used the East Dublin Police Department to monitor activity at the facility, including the operation of the LAS; and generally conspired with the other defendants against Griffin.

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2. In addition to Gornto, Porter, Kight, Reheis, Irvin, and Myers, the complaint named several defendants who are not parties to this appeal. These include Carol Couch, Reheis's successor as EPD commissioner; twenty unnamed "Defendants Does 1-20" accused of participating in the conspiracy; and two municipalities, Laurens County and the City of East Dublin. Laurens County and the City of East Dublin are not part of this interlocutory appeal because they do not enjoy the protection of qualified immunity. Couch is not a party because Griffin's official capacity claim against her was dismissed by the district court.

2. *DuBose Porter*

Dubose Porter holds a seat in the Georgia General Assembly and is co-owner and editor of the Dublin *Courier-Herald*. Like Gornto, Porter allegedly acted against Griffin to advance his personal interests, increase the value of real estate near the plant held by business associates, and generally "curry political favor." Compl. ¶ 31. Griffin specifically claimed that Porter "used the power of his office to demand that Griffin Industries participate in a University of Georgia/Georgia Institute of Technology 'odor study' " in 2000. *Id.* ¶ 33. The complaint further described conduct including meeting with state environmental regulators concerning the plant, publishing hostile editorials and articles in his newspaper, and telephoning a Griffin vice president to warn that regulatory action would be forthcoming if the odor problem was not resolved. Finally, Griffin claimed that Porter persuaded EPD to move up the date of a public hearing on Griffin's Title V permit to benefit his 2002 reelection campaign.

3. *Joshua Kight*

Joshua Kight is a private attorney who was engaged by Gornto, East Dublin, and Laurens County in the campaign against Griffin. Griffin alleged that Kight incited an investigation by the federal Environmental Protection Agency by presenting the agency with an affidavit, signed by a former Griffin employee, that contained false statements. On February 20, 2003, the EPA executed a search warrant at the East Dublin plant.

Griffin and several corporate executives were subsequently indicted on criminal environmental law charges. According to Griffin's complaint, these charges were later dropped.

On the very day the EPA search was conducted, Kight released a report on his investigation of Griffin for Mayor Gornto and the Laurens County Board of Commissioners. Kight's report, which was attached as an exhibit to the plaintiff's complaint, said that Griffin improperly disposed of solid waste from the plant at a local landfill, left tons of partially rendered animal waste to rot outside the plant during the summer of 2002, contaminated groundwater and a local creek, and falsified the LAS spraying records. According to the complaint, the report "demanded that Griffin Industries' LAS Permit be suspended and that the Georgia Attorney General open an investigation into why Defendant EPD had not more strictly regulated the Dublin Facility." *Id.* ¶ 80.

Griffin also alleged that Kight acted improperly in preparing the report. Specifically, it said that Kight, joined by Gornto, "had third parties trespass on the Dublin Facility to obtain water samples,"[3] and that Kight

3. The trespassing allegation may relate to the report's statement that a volunteer had agreed to collect water samples "from what at the time was believed to be an intersecting tributary to Bay Branch [Creek] downstream of the Griffin property." According to the report, the volunteer later discovered that the apparent tributary "was actually a drainage ditch that was fed by spray field run-off," running "like a creek down a hill into Bay Branch." Compl. Ex. R at 6-7.

and Gornto used the East Dublin Police Department to intimidate and harass it.[4] Finally, the complaint alleged that Kight involved American Proteins, Griffin's business competitor, in his efforts against the East Dublin plant. Griffin says that Kight "discussed strategies to attack Griffin Industries with American Proteins President Tommy Bagwell," and that he discussed the possibility of filing lawsuits against the plant "with a person who[m] he believed to be a Griffin Industries[ ] competitor." Compl. ¶ 74. On April 11, 2003, Kight, as counsel for four named plaintiffs, filed a class action suit in state court against Griffin on nuisance grounds. It is unclear whether this suit was the subject of the alleged discussion with a Griffin competitor, and the complaint does not discuss the present status of the suit or say whether the suit was filed pursuant to Kight's engagement on behalf of East Dublin and Laurens County.

4. *Harold Reheis*

Harold Reheis served as director of the Georgia Environmental Protection Division until his retirement in mid-2003. Griffin's primary allegation against Reheis was that he took adverse regulatory action to harm the

4. Kight's report did indicate police involvement in the preparation of the report. It stated that the East Dublin Police Department maintained a log of the plant's LAS spraying activity and that a comparison of the police department's logs with Griffin's official reports to the EPD showed discrepancies indicative of underreporting of spraying volume. Compl. Ex. R at 5-6.

company. The complaint alleged that Reheis met with co-defendants Porter, Gornto, and Kight in February 2003 "to discuss further strategies that they could employ to put the Dublin facility out of business."

Griffin complained that these strategies focused on Griffin's LAS (water quality) and Title V (air quality) permits. More specifically, Griffin claimed that Reheis helped advance Porter's re-election campaign by changing the date of a public hearing on Griffin's Title V permit. The complaint quoted an email from one EPD employee to another stating that "Harold," presumably referring to Reheis, was "open to the idea of having the hearing earlier and wanted to discuss the matter with State Representative Dubose Porter before determining whether it was better to have the hearing before the election or after." Compl. Ex. D. Griffin also attached a second internal EPD email, dated some two months after the first, about "sit[ting] down with Harold Reheis . . . to make sure that Harold agrees with the [Title V] permitting strategy as we might well be going 'outside the box.' " Compl. Ex. P. Finally, when the EPD suspended Griffin's LAS permit on March 14, 2003, Griffin said that Reheis personally notified Kight of the suspension.

5. *Tommy Irvin*

Tommy Irvin is the Commissioner of the Georgia Department of Agriculture. Griffin said that Irvin attended a meeting on August 5, 2002, where Porter sought assurances from state officials that Griffin would

not be allowed to expand its business. Griffin also alleged that Irvin, at Porter's request, called Griffin in 2002. During this conversation, Irvin allegedly told Griffin Vice President Rick Elrod that "East Dublin smells" and that the GDA would "come down on the Dublin Facility hard if it don't straighten out." Compl. ¶ 68 (alterations omitted). Finally, Griffin claimed that Irvin pressured the EPD to "regulate the Dublin Facility's odor emissions despite having no authority to do so and no standards by which to do so." *Id.* ¶ 61.

6. *Lee Myers*

Lee Myers, Assistant Commissioner of the Georgia Department of Agriculture, corresponded with Griffin in the fall of 2002 regarding the condition of the wastewater treatment lagoons and efforts to reduce odors from the plant. The letter she sent Griffin on September 16, 2002, said that the GDA "recognizes and appreciates the modifications made by Griffin Industries to help control malodors" but "believe[s] that more needs to be done." Griffin also claimed that it was required to attend a voluntary settlement meeting despite the fact that it "was not aware of, and had not been informed of, any alleged violations of any law or regulation enforced by GDA," *id.* ¶ 59, and that Myers continued to threaten action against Griffin even though inspectors had not reported malodors at the facility. Griffin alleged that Myers pushed it to adopt odor control measures even though she acknowledged at a hearing on October 29, 2002, that there are no objective standards for odor

regulation. Griffin also asserted that Myers participated in the meeting with Irvin, Porter, and other officials on August 5, 2002.

C. Procedural History

Griffin filed this section 1983 civil rights suit in the United States District Court for the Northern District of Georgia on March 11, 2005, alleging that each of the state and local defendants violated its constitutional rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The suit contains three substantive counts: an equal protection count, a due process count, and a conspiracy count. All of the charges seek compensatory and punitive damages, along with attorney's fees.

Local defendants Gornto and Kight promptly moved to dismiss the lawsuit. The state officials—Couch, Reheis, Irvin, Myers, and Porter—filed a separate motion to dismiss. Both groups argued that most of the conduct alleged fell outside the two-year statute of limitations for section 1983 claims in Georgia, and that the remaining factual allegations were insufficient to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. All of the defendants also claimed entitlements to qualified immunity.

The district court allowed Griffin's equal protection and conspiracy claims to proceed, finding that the complaint did indeed state a claim and that the defendants were not entitled to qualified immunity. The

court did, however, limit the equal protection and conspiracy counts to conduct occurring after March 11, 2003, under Georgia's statute of limitations for § 1983 claims. Griffin's due process count was dismissed on qualified immunity grounds.[5] Defendants timely filed this interlocutory appeal from the district court's denial of qualified immunity. We have jurisdiction over an order denying qualified immunity under the collateral order doctrine. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-30, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

II. DISCUSSION

A motion to dismiss a complaint on qualified immunity grounds will be granted if the "complaint fails to allege the violation of a clearly established constitutional right." *St. George v. Pinellas County*, 285 F.3d 1334, 1337 (11th Cir.2002) (quotation marks and citation omitted). Whether the complaint sets forth a violation is a question of law that we review *de novo*. *Id.* We are required to accept the facts as set forth in the plaintiff's complaint as true, and our consideration is limited to those facts contained in the pleadings and

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5. Griffin had argued that it was denied procedural due process when the EPD suspended its LAS permit. The district court found that Griffin failed to carry its burden of demonstrating that the defendants' conduct violated a clearly established right because reasonable government officials could have believed that the suspension was lawful. Griffin attempted to cross-appeal this decision, but a panel of this court dismissed the cross-appeal for lack of jurisdiction. *Griffin Indus. v. Couch*, No. 06-12370 (Aug. 8, 2006).

attached exhibits. *Thaeter v. Palm Beach County Sheriff's Office,* 449 F.3d 1342, 1352 (11th Cir.2006).

Allowing private citizens to bring suit against public officials requires a careful balance between two powerful and competing interests. The importance of vindicating constitutional rights in a court of law must be balanced against the social costs associated with burdening public officials with vexatious litigation and inhibiting them in the proper discharge of their official duties. *See Anderson v. Creighton,* 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). To accommodate these conflicting interests, the Supreme Court has developed the doctrine of qualified immunity.

Qualified immunity shields public officials from civil damages "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Id.* The doctrine does not, however, shield officials who violate an individual's "clearly established" constitutional rights. *See, e.g., Hope v. Pelzer,* 536 U.S. 730, 743, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (denying qualified immunity because prison guards had "fair warning" that handcuffing an inmate to a hitching post for hours in the Alabama sun violated the Eighth Amendment's proscription of cruel and unusual punishment); *Lee v. Ferraro,* 284 F.3d 1188, 1199 (11th Cir.2002) (denying qualified immunity because no reasonable officer could "possibly have believed that he . . . had the lawful authority to take [an arrestee] to the back of her car and slam her head against the trunk *after* she was arrested, handcuffed, and completely secured").

An official asserting that he is entitled to the protection of qualified immunity must initially establish that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. *Id.* at 1194. Once the defendant has made this showing, the burden shifts to the plaintiff. *Id.* Because it is undisputed that the defendants in this case were acting within the scope of their discretionary authority, Griffin bears the burden of overcoming their qualified immunity defense.

A plaintiff attempting to defeat a public official's qualified immunity defense must make two showings. First, the plaintiff must establish that the defendant violated a constitutional right. *McClish v. Nugent,* 483 F.3d 1231, 1237 (11th Cir.2007). Then, the plaintiff must show that the violation was clearly established. *Id.* at 1248-49; *see also Hope,* 536 U.S. at 741, 122 S.Ct. 2508 ("[T]he salient question . . . is whether the state of the law[6] [at the time of the alleged violation] gave [the defendants] fair warning that their alleged treatment of [the plaintiff] was unconstitutional."). The two inquiries-whether there was a constitutional violation and whether the violation was clearly established–must be conducted in the proper order. Although a court deciding a qualified immunity issue often might find it easier to skip the

6. We have held that constitutional provisions, federal statutes, and judicial decisions of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the relevant state are all capable of clearly establishing the law. *See Marsh v. Butler County,* 268 F.3d 1014, 1032 n. 10 (11th Cir.2001) (en banc).

question of whether there was a constitutional violation and dispose of the case simply on grounds that the law was not clearly established, this approach is prohibited. *McClish,* 483 F.3d at 1238.

If the official did not violate the law, the inquiry ends. *See Scott v. Harris,* __ U.S. __, 127 S.Ct. 1769, 1774, 167 L.Ed.2d 686 (2007). If, however, the official violated the law but his conduct was not clearly established as unlawful, the court must grant him qualified immunity. *McClish,* 483 F.3d at 1249. Only when the official violated the law and the illegality of his conduct was clearly established must the court deny him the protection of qualified immunity. *See Vinyard v. Wilson,* 311 F.3d 1340, 1355 (11th Cir.2002) (denying qualified immunity when the officer's conduct was "so far beyond the hazy border between excessive and acceptable force" that its illegality was clearly established despite the lack of factually analogous case law).

Finally, we observe that qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). This is the logic behind allowing interlocutory appeals from the denial of qualified immunity, *id.* at 526-27, 105 S.Ct. 2806, and it is the basis for the Court's repeated emphasis on resolving qualified immunity issues at the "earliest possible stage in litigation," *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (per curiam). *See also Scott,*

127 S.Ct. at 1773 n. 2 (discussing the interlocutory appeal and early disposition rules).

A. Did Defendants Violate Griffin's Equal Protection Rights?

This is not the normal equal protection case. Griffin Industries does not claim that it was discriminated against because it belongs to a protected class such as race or gender. Instead, Griffin bases its equal protection claim on a less-developed strand of equal protection jurisprudence: the "class of one" claim, first expressly recognized by the Supreme Court in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam).

The district court found that, based on the facts as alleged, the defendants violated Griffin's rights under the Equal Protection Clause. The court began by discussing *Olech*'s recognition of "class of one" claims and went on to discuss Griffin's allegations against the defendants. Specifically, the court observed, Griffin claimed that the defendants violated the Constitution by subjecting it to undue and improper regulatory requirements, imposing arbitrary and capricious requirements, and intentionally acting to deprive it of assets, money, contracts, business, and the right to conduct business. Dist. Ct. Order at 21. The court also highlighted Griffin's claims that it was "singled out" by the defendants and that a "similarly situated" entity, American Proteins, had not been subjected to similar treatment. These allegations, the court concluded, were sufficient to state an equal protection claim.

Our *de novo* review of the district court's conclusion begins with *Olech,* the only Supreme Court case to explicitly discuss a "class of one" claim. In that case, Olech had asked the Village of Willowbrook to connect her property to the municipal water supply. The Village told her that it would provide her a connection if, but only if, she granted the Village a 33-foot easement on her property. Olech protested, noting that the Village had only required her neighbors to provide 15-foot easements in exchange for their connections. 528 U.S. at 563, 120 S.Ct. 1073. Although the Village eventually relented and connected Olech in return for a 15-foot easement, Olech sued. She alleged that the 33-foot easement demand was "irrational and wholly arbitrary" and violated her right to equal protection by deviating from the standard 15-foot easement. *Id.* The district court dismissed her claim, but the Seventh Circuit reversed, finding that Olech's complaint stated an equal protection claim. *Id.* at 563-64, 120 S.Ct. 1073; *see Olech v. Vill. of Willowbrook,* 160 F.3d 386, 387-88 (7th Cir.1998), *aff'd,* 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060.

The Supreme Court granted the Village's petition for certiorari to determine "whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the plaintiff did not allege membership in a class or group." *Olech,* 528 U.S. at 564, 120 S.Ct. 1073. The Court's answer, provided in a four-page per curiam opinion, was that "class of one" equal protection claims are indeed cognizable under the Fourteenth Amendment. The Court's reasoning was set forth in this way:

Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *See Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). In so doing, we have explained that " '[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.' " *Sioux City Bridge Co., supra*, at 445, 43 S.Ct. 190 (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 38 S.Ct. 495, 62 L.Ed. 1154 (1918)).

That reasoning is applicable to this case. Olech's complaint can fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2

> L.Ed.2d 80 (1957). The complaint also alleged that the Village's demand was "irrational and wholly arbitrary" and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement. These allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis. We therefore affirm the judgment of the Court of Appeals, but do not reach the alternative theory of "subjective ill will" relied on by that court.

Id. at 564-65, 120 S.Ct. 1073.

Although the Court observed that it had previously recognized claims like Olech's, the case was nonetheless an important development in equal protection jurisprudence. The "class of one" phrasing had never been used by the Court in the equal protection context,[7] and the cases cited by the Court did not expressly state that equal protection claims were cognizable apart from class-based discrimination.[8] Moreover, both cases cited

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7. If the phrase seems familiar, it may be because it has been used in the Court's jurisprudence regarding the Bill of Attainder Clause. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 472, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (holding that the Presidential Recordings and Materials Preservation Act was not an unconstitutional bill of attainder because former President Nixon "constituted a legitimate class of one").

8. In fact, the Court had previously implied that equal protection claims required class-based discrimination. *See Oyler*

(Cont'd)

as "previously recognizing" class of one claims are about "as far removed from the pantheon of influential equal protection cases as one could imagine." Robert C. Farrell, *Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech*, 78 Wash. L.Rev. 367, 394 (2003). Nevertheless, they do recognize equal protection claims in the absence of class-based discrimination.

In *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923), the Court recognized a plaintiff's equal protection claim where the state tax assessor "intentionally and arbitrarily assessed the Bridge Company's property at 100 per cent. of its true value and all the other real estate and its improvements in the county at 55 per cent." *Id.* at 445, 43 S.Ct. 190. Similarly, in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989), the Court recognized an equal protection claim where the plaintiff's property had "been assessed at roughly 8 to 35 times more than comparable neighboring property, and these discrepancies have continued for more than 10 years with little change." *Id.* at 344, 109 S.Ct. 633. In both cases, the plaintiffs had not alleged that they were members of any particular class, yet the Court

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(Cont'd)

v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962) ("[I]t was not stated that the [alleged discriminatory conduct] was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged.").

recognized their claims under the Equal Protection Clause.

We begin our analysis of Griffin's claim with the observation that a "class of one" claim involves a plaintiff who "alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Olech*, 528 U.S. at 564, 120 S.Ct. 1073. In a case involving a qualified immunity defense, a plaintiff who fails to allege both elements of a "class of one" equal protection claim has not met its burden of showing that the defendant's conduct violated a right embodied in the Constitution. We come, then, to two dispositive issues: (1) whether Griffin alleged that the defendants intentionally treated it differently from others who were *similarly* situated, and (2) if so, whether it claimed that there was no rational basis for the disparate treatment.

1. *Did the Defendants Intentionally Treat Griffin Differently from Others Who Were Similarly Situated?*

Griffin claims that the defendants singled it out for punitive action, and that other similarly situated chicken rendering plants were not subjected to similar regulation. Griffin's complaint focused solely on American Proteins, its competitor in the Georgia poultry rendering business, specifically alleging that "Griffin Industries and American Proteins are similarly situated poultry rendering facilities," and that defendants have "disparately treated and disparately regulated Griffin

Industries in a way that its competitors, including American Proteins, are not treated or regulated."

The central issue here is what degree of similarity is required for two entities to be considered "similarly situated." Too broad a definition of "similarly situated" could subject nearly all state regulatory decisions to constitutional review in federal court and deny state regulators the critical discretion they need to effectively perform their duties. Conversely, too narrow a definition of "similarly situated" could exclude from the zone of equal protection those who are plainly treated disparately and without a rational basis.

Olech's situation was very similar, if not identical, to that of her neighbors-she was a property owner requesting a connection to the municipal water supply, and the Village required her to provide an easement in return. *Olech*, 528 U.S. at 563, 120 S.Ct. 1073. The similarity between Olech and her neighbors was obvious because the Village, as the governmental decisionmaker, had a policy that did not involve a large number of factors in its application. The tax assessment cases cited by the Supreme Court in *Olech* exhibit the same basic pattern-the plaintiffs claimed that the government assessed taxes on the plaintiffs' property at one rate while assessing all other property in the jurisdiction at a much lower rate. *See Allegheny Pittsburgh Coal*, 488 U.S. at 344, 109 S.Ct. 633; *Sioux City Bridge*, 260 U.S. at 445, 43 S.Ct. 190.

This is not to say that the governmental decisions challenged in those cases were simple. For example,

Sioux City Bridge involved a factual dispute over the current value of the bridge, which was thirty-five years old and, "while in good repair[, was] too light for modern traffic." 260 U.S. at 442-43, 43 S.Ct. 190. The bridge also crossed the Missouri River, which delineates the boundary between Nebraska and Iowa, so the percentage of the bridge's value allocable to each state was part of the underlying dispute. *Id.* at 442, 43 S.Ct. 190. Similarly, the market value dispute in *Allegheny Pittsburgh Coal* involved the "topography, location, access, development, mineral content and forestation" of the allegedly overtaxed parcel. 488 U.S. at 340-41 n. 3, 109 S.Ct. 633 (internal quotations and citation omitted).

In each case, however, the Court was able to analyze the "similarly situated" requirement succinctly and at a high order of abstraction. This was because the challenged governmental decisions were ultimately one-dimensional—they involved a single answer to a single question. In *Olech*, the only relevant factor was the size of the easement required in return for connection to the municipal water supply. In *Allegheny Pittsburgh Coal* and *Sioux City Bridge*, the only relevant factor was the market value of the property.

Here, by contrast, the government's regulatory action was undeniably multi-dimensional, involving varied decisionmaking criteria applied in a series of discretionary decisions made over an extended period of time. In reviewing these decisions, we cannot use a simplistic, post-hoc caricature of the decisionmaking

process. Governmental decisionmaking challenged under a "class of one" equal protection theory must be evaluated in light of the full variety of factors that an objectively reasonable governmental decisionmaker would have found relevant in making the challenged decision. Accordingly, when dissimilar governmental treatment is not the product of a one-dimensional decision-such as a standard easement or a tax assessed at a pre-set percentage of market value-the "similarly situated" requirement will be more difficult to establish.

This approach finds support in our case law. In *Campbell v. Rainbow City,* 434 F.3d 1306, 1314 (11th Cir.2006), the only published Eleventh Circuit decision involving the "similarly situated" requirement in the "class of one" context, we addressed a claim brought by a developer denied approval for a proposed building project. *Id.* at 1309. We began by observing that a "showing that two projects were similarly situated requires some specificity," and went on to conclude that the projects being compared "must be *prima facie identical in all relevant respects.*" *Id.* at 1314 (emphasis added). After reviewing the plaintiff's purported comparators, we rejected them all. A similarly situated project that was "prima facie identical in all relevant respects" would be a plan to develop residential apartments, not a commercial or mixed-use plan. *Id.* Moreover, it would be essentially the same size, have an equivalent impact on the community, and require the same zoning variances. *Id.* at 1316 & n. 8. Finally, a similarly situated project would need to be subject to the same governmental decisionmaking process-not just

a similar development project, but a development where the developer actually sought the same form of tentative approval from the city. *Id.* at 1315.

In *Campbell,* the factors relevant to an objectively reasonable governmental decisionmaker included the size of the development, the action requested from the city, the project's zoning status, and so on. Not surprisingly, we rejected the plaintiff's claim when it failed to show the existence of a comparator who was similarly situated in these basic respects. It was not enough that the city had granted approval for a 16-unit apartment complex when the plaintiff sought approval of a complex containing 144 to 180 units, because "[i]t is rational that a zoning board would be less likely to grant a variance to a development that would violate a zoning ordinance like the density requirement to a greater degree." *Id.* at 1316 n. 8.

We have applied a similar standard to private employment discrimination claims brought under the Equal Protection Clause outside the "class of one" context. Similar employees may perform similar functions in different ways. Such differences often will be relevant to an employer's decisions, and they may lawfully result in different employment outcomes. Thus, for example, two nurses performing superficially similar roles at a hospital might differ in their job performance or tardiness. The hospital would clearly find such distinctions relevant in making employment decisions, and it would not violate the Equal Protection Clause if it did, in fact, make different decisions with respect to each

employee on this basis. Accordingly, we have held that an African-American nurse alleging that her hospital employer treated her differently from a similarly situated Caucasian nurse could not simply rely on broad generalities in identifying a comparator. *Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1316-19 (11th Cir.2003). Although both nurses had similar histories of problems with coworkers, the court found it significant that the plaintiff's proposed comparator had a better record when it came to job performance and tardiness. *Id.* at 1316-17. In evaluating this claim, we held that employees must be "similarly situated *in all relevant respects*." *Id.* at 1316 (emphasis added, quotation marks and citation omitted).

We see no reason that a plaintiff in a "class of one" case should be subjected to a more lenient "similarly situated" requirement than we have imposed in other contexts. Adjudging equality necessarily requires comparison, and "class of one" plaintiffs may (just like other plaintiffs) fairly be required to show that their professed comparison is sufficiently apt. *See Campbell*, 434 F.3d at 1314; *Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir.2002) (observing that plaintiffs in a "class of one" case "must demonstrate that they were treated differently than someone who is *prima facie identical in all relevant respects*" (emphasis added)); *Hicks v. Jackson County Comm'n*, 374 F.Supp.2d 1084, 1096 (N.D.Ala.2005) ("The burden of identifying similarly situated individuals is a heavy one."); *cf. Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) ("The Equal Protection Clause does

not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in *all relevant respects* alike.") (emphasis added). Accordingly, when plaintiffs in "class of one" cases challenge the outcome of complex, multi-factored government decisionmaking processes, similarly situated entities "must be very similar indeed." *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir.2004).

A "class of one" plaintiff might fail to state a claim by omitting key factual details in alleging that it is "similarly situated" to another. *See GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1367-68 (11th Cir.1998) ("With regard to the 'similarly situated' prong, the complaint does not present a single instance in which a similarly situated developer was granted a permit; it merely alleges that nameless, faceless 'other' permit applicants were given better treatment. Bare allegations that 'other' applicants, even 'all other' applicants, were treated differently do not state an equal protection claim. . . .").

Ironically, the lack of detail is not the problem here. Griffin's problem is not that it has said too little, but that it has said too much. *See Gen. Guar. Ins. Co. v. Parkerson*, 369 F.2d 821, 825 (5th Cir.1966)[9] ("This complaint is plagued not by what it lacks, but by what it contains. All of the paths to relief which the pleading

9. Fifth Circuit cases decided prior to October 1, 1981 are binding precedent in this circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

suggests are blocked by the allegations and the attached documents themselves, without more."); *Simmons v. Peavy-Welsh Lumber Co.*, 113 F.2d 812, 813 (5th Cir.1940) ("This is not a case where the plaintiff has pleaded too little, but where he has pleaded too much and has refuted his own allegations by setting forth the evidence relied on to sustain them. The appellant was not content to make a short and plain statement of the facts, but undertook to plead evidentiary facts in detail.... The litigant may be defeated by his own evidence, the pleader by his own exhibits; the appellant has become enmeshed in his own prolixity.").

Griffin's complaint contains an abundance of factual detail; the complaint itself is 41 pages long, and it was accompanied by 21 different exhibits. Under the Federal Rules of Civil Procedure, these exhibits are part of the pleading "for all purposes." Fed.R.Civ.P. 10(c); *see Solis-Ramirez v. U.S. Dep't of Justice,* 758 F.2d 1426, 1430 (11th Cir.1985) (per curiam) ("Under Rule 10(c) Federal Rules of Civil Procedure, such attachments are considered part of the pleadings for all purposes, including a Rule 12(b)(6) motion.").

Although Griffin's complaint makes the conclusory allegation that it is similarly situated to American Proteins in all relevant ways, the exhibits attached to the complaint plainly show that this is not the case. Our duty to accept the facts in the complaint as true does not require us to ignore specific factual details of the pleading in favor of general or conclusory allegations. Indeed, when the exhibits contradict the general and

conclusory allegations of the pleading, the exhibits govern. *See Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir.1974) ("Conclusory allegations and unwarranted deductions of fact are not admitted as true, especially when such conclusions are contradicted by facts disclosed by a document appended to the complaint. If the appended document, to be treated as part of the complaint for all purposes under Rule 10(c), Fed.R.Civ.P., reveals facts which foreclose recovery as a matter of law, dismissal is appropriate." (citation omitted)); *Simmons*, 113 F.2d at 813 ("Where there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control.").

According to its complaint, Griffin had recently increased the volume of its rendering activity, and this increase in volume coincided with an increase in citizen complaints. *See* Compl. ¶ 25 ("In the late 1990s, the Dublin Facility began to receive an increased number of complaints from surrounding residents regarding alleged odor."); *id.* ¶ 27 ("It was also at this time that Griffin Industries entered into contracts with significant poultry producers in the State of Georgia."). However, the complaint contains no reference to citizen complaints or volume increases at the named comparator, American Proteins. Similarly, the complaint is filled with allegations regarding the intense political pressure generated by East Dublin citizens unhappy with the operation of the Griffin plant, but there is no allegation that American Proteins was the subject of pressure from unhappy citizens. In evaluating whether a regulator has treated two facilities differently, all three points—recent

substantial changes in the volume of industrial activity, high levels of citizen complaints, and pressure from local politicians—are relevant in the comparison.

But perhaps the clearest illustration that Griffin and American Proteins were not, by the terms of Griffin's own complaint, similarly situated is found in the state administrative law judge decision attached to the complaint. When Griffin appealed the EPD's emergency permit suspension, the administrative law judge overturned the EPD order because the situation at the Griffin plant was not an emergency posing a "substantial and imminent threat to the quality of the waters of the State of Georgia or the public health." Comp. Ex. R at 9. In reaching this conclusion, the administrative law judge observed that American Proteins, like Griffin, had received high pollutant readings from a monitoring well.

Notable, however, was the additional fact that, unlike Griffin Industries, "American Proteins itself alerted EPD of possible water pollution problems at its plant and has been very cooperative in seeking to remediate such problem [s]." *Id.* at 6-7. As the judge explained, "[a]ccurate self-monitoring and reporting by permittees is an essential component of environmental regulation in Georgia. EPD depends on accurate information from permittees in order to carry out its regulatory responsibilities." *Id.* at 3. There is no indication in the complaint that Griffin self-reported any problems with its LAS to anyone. On the contrary, the administrative law judge specifically noted that "EPD did establish that numerous events occurring around the first part of 2003

made it suspect for the first time that there might be problems with the operation of East Dublin's LAS and with the reliability of the data which it had received in the past from the East Dublin Plant." *Id.* at 9.

Accurate self-reporting is critical to the effective enforcement of environmental laws. When regulated entities independently discover and disclose environmental violations, for example, the EPA eliminates or substantially reduces civil and criminal penalties. *See* EPA Environmental Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations-Final Policy Statement, 65 Fed.Reg. 19,618 (Apr. 11, 2000). The purpose of this policy, known as the "Audit Policy," is "to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of Federal environmental law." *Id.* As the EPA observed, "because government resources are limited, universal compliance cannot be achieved without active efforts by the regulated community to police themselves." *Id.* at 19,619.

The state regulators at the EPD and GDA have limited enforcement resources, and they plainly rely on the voluntary cooperation of the companies they regulate. Accordingly, it should not come as a surprise that these regulators would treat companies that self-report differently. In fact, a regulator who failed to account for differences in self-policing among regulated entities would remove any incentive for voluntary cooperation. Griffin's own complaint tells us that self-

reporting is important, that American Proteins self-reported, and that Griffin did not. This difference is nothing if not relevant, and it is fatal, we think, to Griffin's claim that the defendants acted unconstitutionally in not treating them alike.

"The reason that there is a 'similarly situated' requirement in the first place is that at their heart, equal protection claims, even 'class of one' claims, are basically claims of discrimination." *McDonald*, 371 F.3d at 1009. To maintain this focus on discrimination, and to avoid constitutionalizing every state regulatory dispute, we are obliged to apply the "similarly situated" requirement with rigor. "Different treatment of dissimilarly situated persons does not violate the equal protection clause." *E & T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir.1987). Because Griffin's own complaint shows that it was not similarly situated to American Proteins in light of all the factors that would be relevant to an objectively reasonable governmental decisionmaker, Griffin fails to state a claim for a "class of one" equal protection violation.

2. *Was There a Rational Basis for the Difference in Treatment?*

But even if Griffin had successfully alleged the "similarly situated" requirement, its claim would still fail. Griffin's complaint does not, on its face, meet the second prong of its "class of one" claim—the requirement that there be no rational basis for the difference in treatment. As with the similarly situated requirement, we think that

Griffin's pleading is fatal to its claim. The complaint is filled with facts that suggest a rational basis for the defendant's actions. We need not ignore these facts in favor of Griffin's bald assertion that the defendants acted without any rational basis.

Regulators act on the basis of available information. Here, the information available to the state officials included troublesome testing data, a report from a local official alleging severe environmental violations, large numbers of odor complaints from local residents, ongoing concerns about the effectiveness of Griffin's water treatment regimen, and a concurrent criminal investigation by the EPA. Again, Griffin's own complaint provides the information leading to the conclusion that the state officials acted rationally. Thus, for example, the administrative law judge explicitly stated that one of Griffin's monitoring wells showed "alarmingly high" levels of nitrates in samples taken in February and March 2003. We fail to see how it is "irrational" for regulators to suspend a permit when testing data indicates "alarmingly high" levels of pollution.

As for the local officials, the pleading also shows a high number of citizen complaints about the pungent odor coming from Griffin's chicken rendering plant. Local officials undoubtedly act "rationally" when they take up such legitimate concerns with state decisionmakers-here, the environmental regulators. Indeed, this is precisely what their constituents elect them to do. When a high volume of citizen complaints about discernable odors emanating from a nearby

manufacturing facility is combined with "alarmingly high" pollution readings and the possibility that the company has been incorrectly maintaining required records, there can be precious little doubt that a local public official acts rationally in taking his concerns to state regulators charged with enforcing the environmental laws of the state. In sum, the suggestion that the defendants violated the Equal Protection Clause by responding to the concerns of local citizens is, under these circumstances, without merit.

Equal protection of the laws in the "class of one" context requires no more than that Griffin be "secure[d] . . . against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Olech*, 528 U.S. at 564, 120 S.Ct. 1073 (quotation marks and citation omitted). Griffin has failed to demonstrate any such "discrimination" because its own complaint shows that it was not similarly situated to its purported comparator. And even if Griffin had been able to show that it was similarly situated, the facts contained in Griffin's complaint demonstrate that the government actors had a wholly rational foundation for their conduct. There was nothing "arbitrary" in the defendants' actions.

B. Was the Violation Clearly Established?

Because Griffin has failed to adequately allege a constitutional violation, the defendants are entitled to have the complaint dismissed. Nonetheless, we proceed to discuss the second prong of the qualified immunity

analysis out of concern that district courts be properly equipped to evaluate qualified immunity defenses in the context of an increasing volume of "class of one" equal protection claims. *See, e.g., Macon County Invs., Inc. v. Warren,* No. 3:06-CV-224-WKW, 2007 WL 141959, 2007 U.S. Dist. LEXIS 3806 (M.D.Ala. Jan. 17, 2007) (discussing a claim arising from amendments to bingo rules); *Vickers v. Egbert,* 359 F.Supp.2d 1358 (S.D.Ala.2005) (limits on stone crab fishing in Florida); *Hicks v. Jackson County Comm'n,* 374 F.Supp.2d 1084 (N.D.Ala.2005) (public employment); *Berkos v. Vill. of Wellington,* No. 02-81102-CIV, 2003 WL 21383886, 2003 U.S. Dist. LEXIS 25644 (S.D.Fla. Mar. 20, 2003) (limits on the size of a barn under local building permit rules).

The district court in this case found that the violation was clearly established under *Olech* and an Eleventh Circuit case, *Executive 100, Inc. v. Martin County,* 922 F.2d 1536 (11th Cir.1991). The district court's reasoning, in its entirety, was that *Olech* and *Executive 100* "concern violations of equal protection rights, and the Court concludes that these cases were sufficient to put a reasonable state official on notice that the conduct alleged here was unlawful."

In *Vinyard v. Wilson,* 311 F.3d 1340 (11th Cir.2002), we considered three ways in which the law could be clearly established. First, conduct may be clearly established as illegal through explicit statutory or constitutional statements. *Id.* at 1350. Second, certain "authoritative judicial decision[s]" may establish broad principles of law that are clearly applicable in a variety

of factual contexts going beyond the particular circumstances of the decision that establishes the principle. *Id.* at 1351. Third, and most common, is the situation where case law previously elucidated in materially similar factual circumstances clearly establishes that the conduct is unlawful. *Id.* at 1351-52. None are applicable.

The first category is inapplicable because the Equal Protection Clause would not have provided the defendants with fair warning under these circumstances. Under well-established qualified immunity doctrine, the Fourteenth Amendment's broad command that no state shall "deny to any person within its jurisdiction the equal protection of the laws" may, as it does here, simply operate at too high a level of generality. *See Anderson v. Creighton,* 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987):

> The operation of this [clearly established] standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this

> level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of [the qualified immunity doctrine]. Plaintiffs would be able to convert the rule of qualified immunity . . . from a guarantee of immunity into a rule of pleading.

The second category, "authoritative judicial decisions," is also inapplicable. In *Vinyard*, we described this second category as involving "precedents [that] are hard to distinguish from later cases because so few facts are material to the broad legal principle established in these precedents." 311 F.3d at 1351. *Olech* and *Executive 100* are not such cases. The legal principle established in *Olech* and, less explicitly, in *Executive 100*—that the Fourteenth Amendment forbids the denial of equal protection even when the plaintiff is only a "class of one"—is certainly broad. This principle does not, however, fit *Vinyard*'s definition of a precedent that is "hard to distinguish from later cases because so few facts are material to the broad legal principle." 311 F.3d at 1351. To the contrary, as our substantive analysis shows, the precise facts of a case are critical in evaluating a "class of one" claim.

This leaves only the third category, cases where binding precedent "has said that 'Y Conduct' is unconstitutional in 'Z Circumstances.' " *Id.* This is the most common scenario, because "most judicial precedents are tied to particularized facts and fall into this category." *Id.* at 1351-52. In the third category, the

inquiry is whether the facts of a previous case are "fairly distinguishable" from the case before the court:

> When fact-specific precedents are said to have established the law, a case that is fairly distinguishable from the circumstances facing a government official cannot clearly establish the law for the circumstances facing that government official; so, qualified immunity applies. On the other hand, if the circumstances facing a government official are not fairly distinguishable, that is, are materially similar, the precedent can clearly establish the applicable law.

Id. at 1352.

Olech and *Executive 100* are "fairly distinguishable" from the present case. In *Olech*, the challenged governmental decision involved zoning. As we have already observed, the nature of the decision allowed the Court to conduct the "similarly situated" analysis at a high level of abstraction. The same is true of *Executive 100*, another zoning case. *Executive 100* involved a governmental decision we would characterize as one-dimensional—plaintiffs were denied a zoning variance, while other individuals had been granted the same variance. *Executive 100*, 922 F.2d at 1538. Here, in sharp contrast, the defendants were engaged in a complex, multi-year process of environmental regulation. This difference, standing alone, makes this case "fairly distinguishable" from *Olech* and *Executive 100*.

In sum, even if Griffin had stated a violation of the Equal Protection Clause, the district court erred in holding that the defendants' alleged conduct constituted a violation of clearly established law. Neither the state officials nor the local officials had "fair warning" that their actions might subject them to legal liability. Consequently, to hold them liable "would destroy the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties, by making it impossible for officials reasonably to anticipate when their conduct may give rise to liability for damages." *Anderson,* 483 U.S. at 639, 107 S.Ct. 3034 (quotation marks and alteration omitted).

III. CONCLUSION

After thorough review, we reverse the district court's denial of qualified immunity for the defendants. Griffin's "class of one" claim fails to properly allege that the individual defendants intentionally treated a "similarly situated" entity in a disparate manner. Moreover, the facts in Griffin's own complaint plainly contradict the conclusory allegation that the defendants had no rational basis for taking regulatory action. In short, Griffin has failed to allege that the defendants violated the Equal Protection Clause of the Fourteenth Amendment, and it

has failed to meet its burden of showing that the defendants were not entitled to qualified immunity.[10]

REVERSED and REMANDED.

10. Griffin moved for sanctions pursuant to Eleventh Circuit Rule 33-1(f) against Gornto, Myers, Irvin, and Porter for failure to appear at a circuit mediation conference on June 1, 2006. This motion for sanctions was carried with the case, and it is hereby DENIED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION FILED MARCH 23, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:05-cv-0684-WSD

GRIFFIN INDUSTRIES, INC.,

Plaintiff,

v.

CAROL COUCH, et al.,

Defendants.

ORDER

This is a Section 1983 action in which Plaintiff Griffin Industries, Inc. ("Plaintiff") alleges certain Georgia state and city government officials conspired to unlawfully deprive Plaintiff of its constitutional rights. It is before the Court on Defendants City of East Dublin, George Gornto and Joshua E. Knight's Motion to Transfer [7], Defendants City of East Dublin, George Gornto and Joshua E. Knight's Motion to Dismiss [8], Defendant Laurens County's Motion for Judgment on the Pleadings [10], Defendant Carol Couch, Tommy Irvin, Lee Myers, Harold Reheis and DuBose Porter's Motion to Dismiss

[24], and Defendant Carol Couch, Tommy Irvin, Lee Myers, Harold Reheis and DuBose Porter's Motion to Transfer [48].

I. BACKGROUND

Plaintiff owns and operates a rendering facility located in Laurens County, Georgia, adjacent to the city of East Dublin, Georgia (the "Dublin Facility"). Plaintiff alleges that certain Georgia state and city government officials conspired to harm Plaintiff's business and shut down the Dublin Facility. It further alleges that these officials acted unlawfully in furtherance of this alleged conspiracy, including by engaging in disparate and arbitrary environmental and administrative regulation and permitting practices with respect to Plaintiff.

Plaintiff filed this action on March 11, 2005, asserting claims under Section 1983 for violation of its rights of equal protection and procedural due process. Plaintiff named the following individuals or entities as defendants: (1) Carol Couch, the Director of the Georgia Environmental Protection Division of the Georgia Department of Natural Resources ("EPD"); Tommy Irvin, the Commissioner of the Georgia Department of Agriculture ("GDA"); Lee Myers, the Assistant Commissioner of GDA; Harold Reheis, the former EPD director; and Dubose Porter, a member of the Georgia General Assembly and co-owner and editor of the *Courier-Herald*, a newspaper circulated in Dublin, Georgia (collectively, the "State Defendants"); (2) the City of East Dublin, Georgia; George Gornto, the mayor

of East Dublin; and Joshua E. Kight, special counsel for East Dublin and Laurens County (collectively, "the East Dublin Defendants"); and (3) Laurens County, Georgia ("Laurens County").

II. DISCUSSION

A. Defendants' Motions to Transfer

The East Dublin Defendants and the State Defendants move the Court to transfer this case to the Southern District of Georgia. Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a); *see generally Van Dusen v. Barrack*, 376 U.S. 612, 616, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964) (holding that the purpose of Section 1404(a) is "to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense") (citations omitted). Section 1404(a) "requires the court to consider three factors: (1) the convenience of the parties; (2) the convenience of the witnesses; and (3) the interest of justice." *Moore v. McKibbon Bros., Inc.*, 41 F.Supp.2d 1350, 1356 (N.D.Ga.1998). The moving party bears the burden of establishing that the balance of Section 1404(a) interests favors the transfer. "[F]ederal courts traditionally have accorded a plaintiff's choice of forum considerable deference," *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir.1989), and "unless the balance is strongly in favor of the defendant, the plaintiff's choice

of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). The decision to transfer a case under Section 1404(a) rests within the Court's sound discretion. *See Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 654-55 (11th Cir.1993) (reviewing district court's transfer of venue for "clear abuse of discretion") (citations omitted).

1. *The East Dublin Defendants' Motion to Transfer*

The East Dublin Defendants argue that transfer to the Southern District of Georgia is warranted because (1) the majority of likely witnesses are located in the Southern District; and (2) a visit to the Dublin Facility may be required during the course of a jury trial in this matter. (East Dublin Defs.' Mem. of Law in Supp. of Mot. to Transfer at 4-5.) Having reviewed the record and the submissions of the parties on this issue, the Court finds the East Dublin Defendants' arguments are not sufficient to establish that the balance of Section 1404(a) interests favors transfer.

First, the East Dublin Defendants fail to provide adequate support for their claim that the majority of likely witnesses are located in the Southern District of Georgia. Exhibit A of the East Dublin Defendants' motion is a list of parties and witnesses who are alleged to reside in the Southern District. (*Id.* at Ex. A.) Neither the list nor their arguments based on it are supported by affidavit or declaration testimony. In addition, the East Dublin Defendants failed to provide address

information for these witnesses or a summary of their expected testimony. This summary is necessary for the Court to evaluate whether and to what extent the testimony is relevant to the claims at issue in this case. On the record before the Court, this evaluation is not possible. The East Dublin Defendants also fail to identify the alleged Southern District witnesses with specificity, electing instead to designate general categories of potential witnesses such as "[m]ultiple neighboring citizens" and "[m]ultiple unknown employees of [the Dublin] facility." (*See id.*) Defendants' asserted justification for transferring this case to the Southern District of Georgia is inadequate to overcome the deference accorded to Plaintiff's choice of this District as its litigating forum.[1]

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1. Apparently recognizing the deficiency of their factual showing in the initial motion to transfer, the East Dublin Defendants attached to their reply brief the Declaration of Theodore Freeman. (*See* East Dublin Defs.' Reply in Supp. of Mot. to Transfer [41], Ex. A.) Submitting supplemental affidavits or declarations on reply generally is improper, since it denies the opposing party an opportunity to address these materials in its response. *See United States v. Ga. Dep't of Natural Res.*, 897 F.Supp. 1464, 1471 (N.D.Ga.1995) ("This court will not consider arguments raised for the first time in a reply brief."). Because the East Dublin Defendants have not offered a sufficient reason for failing to include these materials with their initial motion, the Court has not considered the Freeman Declaration in deciding their motion. Even if it had, the list of witnesses identified in the declaration does not persuade the Court that transfer is appropriate in this case, in view of the uncertainty regarding the quality and scope of the testimony they might offer and what role, if any, these witnesses will have in the litigation.

Second, the Court is not persuaded that a jury viewing of the Dublin Facility is required in this case. The crux and litigation focal point of Plaintiff's case is an alleged conspiracy to violate its constitutional rights. Although the alleged regulatory actions taken by Defendants concerned odor emissions from the Dublin Facility, the claims in this case turn on whether Plaintiff was treated differently than other similarly situated corporate entities and whether Plaintiff was afforded adequate procedural due process in the course of its dealings with the State Defendants. A first-person viewing of the Dublin Facility is not likely to aid the jury in its analysis of these claims.[2] Further, the possibility of a jury viewing, to the extent it weighs in favor of transfer to the Southern District, is just one of the factors examined by the Court under the "interests of justice" element. *See Moore v. McKibbon Bros., Inc.*, 41 F.Supp.2d 1350, 1356-57 (N.D.Ga.1998) (holding that when considering the "interest of justice" element under Section 1404(a), the Court looks at the same factors that have been traditionally used in applying the doctrine of forum non conveniens, including (i) the relative ease of access to sources of proof; (ii) the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; (iii) the possibility of view of prernises, if view would be

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2. The Dublin Facility is located approximately 137 miles from this Court. Thus, should a jury viewing of the Dublin Facility become necessary, a viewing staged from this Court, although less convenient than a viewing staged from the Dublin Division of the Southern District, is ot impossible or unduly burdensome.

appropriate to the action; and (iv) all other practical problems that make trial of a case easy, expeditious and inexpensive) (citations omitted). The East Dublin Defendants fail to argue that these other factors support transfer here.

Because the East Dublin Defendants fail to demonstrate that the balance of factors under Section 1404(a) strongly favor transfer and therefore warrant disturbing Plaintiff's choice of forum, their motion to transfer this case to the Southern District of Georgia is DENIED.

2. *The State Defendants' Motion to Transfer*

The State Defendants' motion, which simply adopts the arguments made by the East Dublin Defendants, is untimely. Absent permission of the Court, or an independent deadline set out in the Local Rules, all motions must be filed within thirty (30) days after the preliminary planning report is filed or should have been filed. Here, the parties filed their Joint Preliminary Report and Discovery Plan [34] on May 3, 2005. The State Defendants filed their motion to transfer on July 8, 2005, more than thirty days after the Joint Preliminary Report was filed, and they did not obtain permission of the Court prior to filing. The Court notes further that although the parties noted the East Dublin Defendants' motion to transfer in the Joint Preliminary Report, the State Defendants did not forecast to the Court that they intended to file a motion to transfer and that they may need additional time to do so. (*See* Joint Preliminary Report at 6.)

Because the East Dublin and State Defendants have not made a sufficient showing that this matter should be transferred, and because the State Defendants' motion otherwise is untimely, the motion is DENIED.

B. Defendants' Motions to Dismiss

The State Defendants and the East Dublin Defendants move to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The law in this Circuit governing motions to dismiss pursuant to Rule 12(b)(6) is well settled. Dismissal of a complaint is appropriate only when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action. *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir.1993). "Although a plaintiff is not held to a very high standard in a motion to dismiss for failure to state a claim, some minimal pleading standard does exist." *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 289 F.3d 1268, 1270 (11th Cir.2002), *vacated on other grounds*, 314 F.3d 541 (11th Cir.2002) (en banc). "To survive a motion to dismiss, plaintiffs must do more than merely state legal conclusions; they are required to allege some specific factual bases for those conclusions or face dismissal of their claims." *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1263 (11th Cir.2004) ("[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.") (citations omitted). The factual allegations set out in the Complaint are

accepted as true for the purposes of Defendants' motions to dismiss. *See Lotierzo v. Woman's World Med. Ctr., Inc.*, 278 F.3d 1180, 1182 (11th Cir.2002).

1. *The State Defendants' Motion to Dismiss*

The State Defendants argue Plaintiff's claims against them should be dismissed because (1) claims against the State Defendants in their official capacities fail because the State is not a "person" under Section 1983; (2) much of the alleged conduct falls outside the two-year statute of limitations for Section 1983 claims; (3) Plaintiff's allegations with respect to conduct occurring within two years of the Complaint are not sufficient to state a claim for violation of its constitutional rights of equal protection or procedural due process; (4) the State Defendants are entitled to qualified immunity with respect to Plaintiff's claims for damages against them; and (5) the Court should abstain from deciding Plaintiff's claims for injunctive relief. (State Defs.' Br. in Supp. of Mot. to Dismiss at 2-25.) The Court shall address these arguments in turn.

a. *Plaintiff's Claims for Damages Against the State Defendants in Their Official Capacities*

Plaintiff asserts claims for damages against Defendants Couch, Irvin and Myers in their official capacities. (Compl. ¶¶ 2, 3, 4.) The State Defendants move to dismiss these claims on the ground that claims against state officials in their official capacities are, in

fact, claims against the state, and the state is not a "person" subject to suit under Section 1983. (State Defs.' Br. in Supp. of Mot. to Dismiss at 2) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) ("[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983."). The State Defendants also assert that such claims are barred by Eleventh Amendment immunity. (*Id.* at 3) (citing *Schopler v. Bliss*, 903 F.2d 1373, 1378 (11th Cir.1990) ("[T]he Eleventh Amendment extends to state agencies and other arms of the state, but it does not reach lawsuits against municipalities and other discreet political subdivisions that are sufficiently independent from the state."). *Cf. ABATE of Ga., Inc. v. Georgia*, 137 F.Supp.2d 1349, 1358 (N.D.Ga.2001) (concluding that "damages may not be recovered from the State, its agencies, or its officials acting in their official capacity because the State of Georgia has not waived its Eleventh Amendment immunity and Congress has not validly overridden it."). Plaintiff does not refute that its claims for damages against Defendants Couch, Irvin and Myers in their official capacities should be dismissed on these grounds. (*See* Pl.'s Resp. to State Defs.' Mot. to Dismiss [32].) Accordingly, the State Defendants' motion to dismiss these claims is GRANTED.

b. *Statute of Limitations*

Section 1983 claims in Georgia are governed by a two-year statute of limitations. *See Rozar v. Mullis*, 85 F.3d 556, 560-61 (11th Cir.1996) (stating that "precedent

is clear that [Section 1983 claims] are measured by the personal injury limitations period of the state" and that Georgia law provides a two-year statute of limitations for personal injury claims) (citing O.C.G.A. § 9-3-33)). The Complaint in this case was filed on March 11, 2005. The State Defendants move to dismiss Plaintiff's claims to the extent they are based on alleged conduct which occurred more than two years prior to the filing of the Complaint, i.e., before March 11, 2003. (State Defs.' Br. in Supp. of Mot. to Dismiss at 3-4.)[3] Plaintiff concedes that its claims are governed by a two-year statute of limitations, but argues that its claims based on pre-March 11, 2003 conduct are not barred because (1) the

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3. The pre-March 11, 2003 conduct alleged in the Complaint includes various Defendants' urging East Dublin residents to complain to GDA regarding odors from the Dublin Facility (Compl.¶¶ 29, 69-70), Defendant Porter's demand that Plaintiff participate in an "odor study," (*id.* at ¶ 33), EPD's issuing a "first draft" of the Title V permit for the Dublin Facility (*id.* at ¶ 42), GDA's pressuring Plaintiff to enter into a voluntary agreement to minimize malodors at the Dublin Facility (*id.* at ¶¶ 49-52), various Defendants' demands that the Title V permit for the Dublin Facility include odor control requirements (*id.* at ¶ 57), Defendant Porter's publication of negative editorials regarding the Dublin Facility in 2002 (*id.* at ¶ 67), East Dublin police's patrolling of the Dublin Facility (*id.* at ¶ 71), Defendants Gornto and Knight directing third parties to trespass on Plaintiff's property (*id.* at ¶ 75), Defendant Knight's solicitation of an affidavit containing alleged false statements (*id.* at ¶ 76), the United States Environmental Protection Agency's search of the Dublin Facility (*id.* at ¶ 77), and Defendant Knight's publication of a report accusing Plaintiff of numerous environmental crimes (*id.* at ¶ 80).

statute of limitations is tolled under Georgia's continuing tort doctrine; and (2) under the "discovery rule," Plaintiff's claims did not accrue until within two years of its Complaint. (*See* Pl.'s Resp. to State Defs.' Mot. to Dismiss at 10-12.)[4]

The continuing tort doctrine tolls the statute of limitations where the injury resulting from a tortious act is not immediately apparent and the victim could not in the exercise of ordinary care have learned of it. *See Forgay v. Tucker*, 128 Ga.App. 497, 197 S.E.2d 492, 501 (Ga.Ct.App.1973) ("Analysis of ["continuing tort doctrine"] cases in the light of their respective and

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4. In Section 1983 cases, "the length of the limitations period, and the closely related questions of tolling and application, are to be governed by state law." *Wilson v. Garcia*, 471 U.S. 261, 276-77, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). Determining when a Section 1983 claim accrues, however, is governed by federal law. *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir.1987) ("[W]hen a Section 1983 action accrues is a question of federal law."). Plaintiff characterizes the "discovery rule" as a tolling mechanism under Georgia law. (Pl .'s Resp. to State Defs.' Mot. to Dismiss at 10.) It is clear to the Court from Plaintiff's citations and its discussion of the "discovery rule," however, that Plaintiff actually is referring to the issue of when its Section 1983 claims accrued under federal law. (*See id.* at 11-12) (citing *Mullinax*, 817 F.2d at 717). *Cf. Ashcroft v. Randel*, 391 F.Supp.2d 1214, 1219 (N.D.Ga.2005) ("Under the federal 'discovery rule,' a claim accrues when the injured party knew or should have known both (1) that he has suffered the injury that forms the basis of his complaint and (2) who inflicted that injury.") (citations omitted). The Court will construe Plaintiff's argument accordingly.

differing factual situations authorizes the conclusion that when the injury resulting from a tortious act is not immediately apparent the statute of limitation is tolled so long as the victim could not in the exercise of ordinary care have learned of it. . . ."); *Everhart v. Rich's, Inc.*, 229 Ga. 798, 194 S.E.2d 425, 428 (Ga.1972) (holding that a breach of a duty to another constitutes "a tort of a continuing nature which tolls the statute of limitation so long as the continued exposure to the hazard is occasioned by the continued failure of the tortfeasor to warn the victim, and the statute of limitation does not commence to run under these circumstances until such time as the continued tortious act producing injury is eliminated, e.g., by an appropriate warning in respect to the hazard.").[5] Georgia courts have applied the

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5. The cases applying the continuing tort doctrine are not entirely consistent regarding whether this doctrine is a tolling mechanism or a rule governing the date of accrual of certain tort actions. *Compare Forgay*, 197 S.E.2d at 501, *with Waters v. Rosenbloom*, 268 Ga. 482, 490 S.E.2d 73, 75 (Ga.1997) ("Georgia courts have consistently held that in a continuing tort a cause of action *accrues* when a plaintiff discovers, or with reasonable diligence should have discovered, both the injury and the cause thereof.") (emphasis added), *and Tucker v. S. Wood Piedmont Co.*, 28 F.3d 1089, 1091 (11th Cir.1994) ("Under Georgia law, a cause of action for a tort that is continuing in nature-for example, the frequent runoff of contaminated water across land, or . . . the underground leakage of hazardous waste onto adjoining property—*accrues* at the time of continuance.") (emphasis added). This distinction is critical here, where the tolling of the two-year statute of limitations for Plaintiff's Section 1983 claims is governed by state law, but the date of the accrual of those

(Cont'd)

continuing tort doctrine in a limited set of factual circumstances, including where a physician fails to remove a foreign object placed in his patient's body during treatment. *See Dalbey v. Banks*, 245 Ga. 162, 264 S.E.2d 4, 5 (Ga.1980) ("[A physician's] failure to remove [the foreign object] goes beyond ordinary negligence so as to be classified by the legislature as a continuing tort which tolls the statute of limitations until the object is discovered."); *Parker v. Vaughan*, 124 Ga.App. 300, 183 S.E.2d 605, 606-07 (Ga.Ct.App.1971).

Plaintiff argues the continuing tort doctrine applies here because "[D]efendants conspired to take, and have taken, repeated and continuing steps to deprive [Plaintiff] of its past and present constitutional rights." (Pl.'s Resp. to State Defs.' Mot. to Dismiss at 11.) This argument is without merit. The factual circumstances alleged in this case bear no resemblance to those in which Georgia courts have applied the continuing tort doctrine. The alleged conduct of which Plaintiff complains and alleged injury resulting from them were known to Plaintiff at or near the time they occurred. Indeed, the acts complained of were largely public and often made known to Plaintiff immediately. (*See* Compl. ¶¶ 24-80.)

(Cont'd)
claims is governed by federal law. If the continuing tort doctrine is a rule governing the accrual of certain tort actions in Georgia, it is irrelevant to the statute-of-limitations issue in this case. Because neither party addresses this issue, the Court assumes without deciding that the continuing tort doctrine is a tolling mechanism which may be properly applied to a Section 1983 claim.

Their alleged effects also were public and, to the extent they were not, it would have taken little effort for Plaintiff to discover the effect of the conduct alleged. This is not a case where, like the foreign object negligently left in the patient's body during treatment, the injury resulting from a tortious act is not immediately apparent and the victim could not in the exercise of ordinary care have learned of it. Accordingly, the Court finds that the continuing tort doctrine does not apply here.

Plaintiff's arguments regarding the date of accrual of its claims based on pre-March 11, 2003 conduct also are without merit. "In Section 1983 cases, the statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Mullinax,* 817 F.2d at 716 (citing *Calhoun v. Ala. Alcoholic Beverage Control Bd.,* 705 F.2d 422, 425 (11th Cir.1983) (internal punctuation and quotations omitted); *see also Rozar,* 83 F.3d at 562 ("Under section 1983, a claim accrues when the plaintiff knows or has reason to know that he was injured, and he is or should be aware who injured him."); *Ashcroft,* 391 F.Supp.2d at 1219 ("In assessing whether [a Section 1983 plaintiff] should have known of his claim, the Court must determine whether facts sufficient to support a cause of action were or should have been apparent to a person with a reasonably prudent regard for his rights.") (citations omitted).

Plaintiff does not dispute that, with respect to pre-March 11, 2003 conduct, it knew or had reason to know that it was injured at the time the alleged conduct occurred. (Pl.'s Resp. to State Defs.' Mot. to Dismiss at 11-12.) *See generally Rozar*, 85 F.3d at 563 (holding that Section 1983 claims against county officials accrued at the time of the alleged racially motivated county action). Nor does Plaintiff dispute that, with respect to the named defendants, it knew or had reason to know who injured it prior to March 11, 2003. (*See* Pl.'s Resp. to State Defs.' Mot. to Dismiss at 11-12.) Instead, Plaintiff argues that its Section 1983 claims have not yet accrued because it "is still not aware . . . of all defendants involved in the conspiracy to deprive [it] of its constitutional rights, and is not fully aware of the interaction between defendants to deprive [Plaintiff] of its rights." (Pl.'s Resp. to State Defs.' Mot. to Dismiss at 12) (citing *Mullinax*, 817 F.2d at 717).

Taken at face value, Plaintiff's argument appears to be that a Section 1983 claim does not accrue until the plaintiff, through informal investigation or otherwise, is fully aware of all possible defendants or the full extent of their interactions. This simply is not the law. *See Rozar*, 83 F.3d at 562; *Ashcroft*, 391 F.Supp.2d at 1219. In fact, the lone case cited by Plaintiff undermines, rather than supports, his theory. In *Mullinax v. McElhenney*, the Eleventh Circuit evaluated whether the two-year statute of limitations barred a Section 1983 plaintiff's claim against two attorneys alleged to have participated in her entrapment. 817 F.2d at 716-17. Although the attorneys' conduct with respect to the

entrapment occurred more than two years before the plaintiff's complaint was filed, the court concluded that her claims were not barred because she did not discover that the attorneys were involved in the entrapment until after she was arrested, less than two years prior to the filing of her complaint. *Id.*

The court's holding in *Mullinax* does not support Plaintiff's argument that a Section 1983 claim does not begin to accrue until all possible defendants are discovered. Instead, it demonstrates that a court must examine the allegations with respect to each of the defendants to determine when the facts giving rise to the Section 1983 claim against a particular defendant were or should have been apparent to a person with a reasonably prudent regard for his rights. *See Mullinax*, 817 F.2d at 716-17. An examination of Plaintiff's allegations in this case demonstrates that the facts giving rise to its cause of action with respect to Defendants' pre-March 11, 2003 conduct—including the alleged conduct itself and the various Defendants' alleged participation in that conduct—were or should have been apparent to a person with a reasonably prudent regard for his rights prior to March 11, 2003. Accordingly, these claims accrued before March 11, 2003, and are barred by the two-year statute of limitations.

For these reasons, the State Defendants' motion to dismiss Plaintiff's Section 1983 claims based on conduct which occurred prior to March 11, 2003, is GRANTED. Plaintiff's claims with respect to the State Defendants are limited to conduct occurring after March 11, 2003,

including the temporary suspension of its Land Application System ("LAS") permit for the Dublin Facility on March 14, 2003, and the Title V permit proceedings beginning in the Spring of 2003.[6]

c. *Plaintiff's Section 1983 Claims for Alleged Violation of Its Rights to Equal Protection and Procedural Due Process*

Section 1983 does not itself confer any substantive rights. *See* 42 U.S.C. § 1983; *Graham v. Connor*, 490 U.S. 386, 393-94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Instead, it provides a private cause of action for persons whose rights under the United States Constitution have been violated under color of state law—"a method of vindicating federal rights elsewhere conferred." *See Graham*, 490 U.S. at 393-94. To establish a Section 1983 violation, a plaintiff must show: (1) conduct committed by a person acting under color of state law; (2) that deprived them of rights, privileges or immunities secured by the Constitution or laws of the United States. *See Duke v. Massey*, 87 F.3d 1226, 1231 (11th Cir.1996). Here, Plaintiff alleges the State Defendants violated its rights to equal protection and procedural due process under the Fourteenth Amendment.[7] The State

6. The Court expresses no opinion on whether any of the alleged pre-March 11, 2003 events have evidentiary value or would be admissible in a proceeding based on post-March 11, 2003 conduct.

7. Plaintiff does not assert a substantive due process claim. (Pl.'s Resp. to State Defs.' Mot. to Dismiss at 2 n. 1).

Defendants move to dismiss these claims for failure to state a claim upon which relief can be granted, arguing that Plaintiff fails to allege conduct on the part of the State Defendants which constitutes a violation of its constitutional rights. (State Defs.' Br. in Supp. of Mot. to Dismiss at 4-9.)

i. Equal Protection

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (citation omitted). "[T]o properly plead an equal protection claim, a plaintiff need only allege that through state action, similarly situated persons have been treated disparately." *Thigpen v. Bibb County, Ga., Sheriff's Dep't*, 223 F.3d 1231, 1237 (11th Cir.2000), *abrogation on other grounds recognized by Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258 (11th Cir.2003). It is not necessary for a plaintiff asserting an equal protection claim to allege that it is a member of a protected class. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). Courts recognize equal protection claims brought by a "class of one," where the plaintiff "alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *See id.* at 564-65.

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Plaintiff alleges that the State Defendants have intentionally discriminated against it by, among other things, "subjecting [it] to undue and improper regulatory requirements, by imposing arbitrary and capricious requirements and sanctions on [its] Dublin Facility, and by intentionally acting to deprive [Plaintiff of its] assets, money, contracts, business, right to conduct business, and to damage [its] reputation and business good will." (Compl.¶ 106.) Plaintiff alleges that it has been "singled out" by the State Defendants and that other similarly situated rendering facilities operating in Georgia, including those owned and operated by its primary competitor American Proteins, have not been subjected to similar treatment despite environmental conditions at their facilities that were equal to or worse than those at the Dublin Facility. (*Id.* at ¶¶ 17-20, 63, 91, 107.)

The Court finds that these allegations, which must be accepted as true for the purposes of the motion to dismiss, are, at this stage, sufficient to state an equal protection claim. *See Olech*, 528 U.S. at 564-65 (holding that the plaintiff's allegation that the government intentionally demanded a 33-foot easement from her but required only a 15-foot easement from other similarly situated property owners was sufficient to state a claim for relief under traditional equal protection analysis); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir.1991) (holding that the plaintiff landowners' allegation that the defendant board of county commissioners treated them differently from other similarly situated landowners without any reasonable basis in denying their request for zoning change was

sufficient to state an equal protection claim). Accordingly, the State Defendants' motion to dismiss Plaintiff's equal protection claim is DENIED.

ii. Procedural Due Process

Plaintiff alleges it was denied procedural due process in connection with the EPD's March 14, 2003 Emergency Order suspending Plaintiff's LAS permit for the Dublin Facility. It is undisputed that Plaintiff challenged the EPD's Emergency Order and that on April 29, 2003, following an evidentiary hearing, an administrative law judge issued a final decision reversing the Emergency Order and lifting the suspension on the LAS permit. (Compl.¶¶ 88-89.) According to the allegations in the Complaint, the administrative law judge determined that the EPD had no factual basis for imposing the suspension and that the agency had not imposed similar penalties on Plaintiff's competitors despite the existence of equal or worse environmental conditions at their facilities. (*Id.* at ¶¶ 90-91.) Plaintiff alleges that it incurred over $400,000 in damages in the form of increased operating costs and attorneys' fees and expenses as a result of the Emergency Order. (*Id.* at ¶ 92.)

The State Defendants move to dismiss Plaintiff's procedural due process claim for failure to state a claim upon which relief can be granted. (State Defs.' Br. in Supp. of Mot. to Dismiss at 7-9.) "In this circuit, a § 1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest;

(2) state action; and (3) constitutionally-inadequate process." *Cryder v. Oxendine*, 24 F.3d 175, 177 (11th Cir.1994). For the purposes of their motion to dismiss, the State Defendants do not dispute that Plaintiff suffered a deprivation of a constitutionally protected property interest as a result of state action. (State Defs.' Br. in Supp. of Mot. to Dismiss at 8.) They argue Plaintiff's claim fails because the process provided by the State with respect to the March 14, 2003 suspension of its LAS permit was constitutionally adequate. (*Id.* at 8-9.)[8]

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8. The post-March 11, 2003 conduct of which Plaintiff complains is (1) the March 14, 2003 temporary suspension of its LAS permit; (2) the March 17, 2003 article published in Defendant Porter's newspaper, the *Courier-Herald;* (3) the private class-action lawsuit filed against Plaintiff on April 11, 2003; (4) the ongoing Title V permit proceedings which began in the Spring of 2003; and (5) the October 2003 indictment of certain current and former employees of Plaintiff on the basis of an affidavit obtained by Defendant Knight. (Compl.¶¶ 78, 81-102.) Of these alleged actions, it is clear that only the temporary suspension of the LAS permit qualifies as a deprivation of a constitutionally protected interest as a result of state action. The October 2003 indictment was pursued by the United States Environmental Protection Agency, and Plaintiff does not allege a conspiracy between any of the defendants and this federal agency. (Compl.¶¶ 76-79.) The article and lawsuit do not constitute deprivations of constitutionally protected interests as a result of state action, and it is clear from the record that, at the time of the filing of the Complaint and motions to dismiss, and Title V permit restrictions challenged by Plaintiff had not gone into effect and were the subject of ongoing state administrative proceedings. *See generally Zinermon v. Birch,*

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The parties' dispute concerning the adequacy of process provided to Plaintiff with respect to the suspension of the LAS permit focuses on whether Plaintiff was entitled to a hearing before the March 14, 2003 Emergency Order was issued. To determine in a particular case what procedural protections are mandated by the Constitution's guarantee of due process, courts weigh several factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Zinermon v. Birch, 494 U.S. 113, 127, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). "Applying this test, the [Supreme Court] usually has held that the Constitution requires some kind of a hearing

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494 U.S. 113, 123, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) (holding that procedural due process violations do not become complete "unless and until the state refuses to provide due process"). Accordingly, Plaintiff's procedural due process claim is viable only with respect to the State Defendants' temporary suspension of its LAS permit.

before the State deprives a person of liberty or property." *Zinermon,* 4949 U.S. at 127; *see also id.* at 132 ("In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking."); *McKinney v. Pate,* 20 F.3d 1550, 1561 (11th Cir.1994) ("It is axiomatic that, in general, the Constitution requires that the state provide fair procedures and an impartial decisionmaker before infringing on a person's interest in life, liberty, or property.").

"In some circumstances, however, a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process." *Zinermon,* 494 U.S. at 127. Courts have indicated that such post-deprivation remedies are sufficient where pre-deprivation process is not feasible or where exigent circumstances justify an alleged deprivation without process. *See Carcamo v. Miami-Dade County,* 375 F.3d 1104, 1106 n. 4 (11th Cir.2004) ("[T]he acceptability of post-deprivation process turns on the feasibility of pre-deprivation process . . ."); *McKinney,* 20 F.3d at 1562-63 ("[D]ue process [does] not require pre-deprivation hearings where the holding of such a hearing would be impracticable, that is, where the deprivation is the result of either a negligent or an intentional deprivation of property."); *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 19, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) (stating that a pre-deprivation hearing may not be required "where the potential length

or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination"); *Grayden v. Rhodes*, 345 F.3d 1225, 1236-37 (11th Cir.2003) ("We conclude . . . that the emergency evacuation of tenants from a dangerous and potentially life-threatening structure qualifies as an 'extraordinary situation' [in which] tenants can be evicted from a building reasonably judged to be unfit for human occupancy without a pre-deprivation hearing."). As the Supreme Court explained in *Zinermon*, the cases in which post-deprivation remedies are found to satisfy due process are not an exception to the *Matthews v. Eldridge* analysis; instead, they represent a special subset of the analysis in which post-deprivation remedies "are all the process that is due, simply because they are the only remedies the State could be expected to provide." 494 U.S. at 128.

The State Defendants argue that the post-deprivation hearing provided by the State here was sufficient because of the emergency nature of the EPD's March 14, 2003 order suspending Plaintiff's LAS permit. (State Defs.' Br. in Supp. of Mot. to Dismiss at 8-9; State Defs.' Reply in Supp. of Mot. to Dismiss [42] at 6-11.) They fail, however, to address the factors articulated in *Matthews v. Eldridge*, and the Court is without sufficient information at this stage of the litigation to conduct this analysis *sua sponte*. For example, with respect to the adequacy of procedural safeguards in place regarding emergency suspension of the LAS permit, the State Defendants argue only that EPD "has authority under

the Georgia Water Quality Control Act . . . to take emergency action '[w]henever the division finds that an emergency exists requiring that such action be taken as it deems necessary to meet the emergency." (State Defs.' Reply in Supp. of Mot. to Dismiss at 7.) They do not elaborate on what criteria, if any, the agency decisionmaker is required to rely in determining that environmental conditions at a particular facility are unsafe to the general public, nor do they cite the Court to any objective standards established by the agency for determining what circumstances warrant intervention on an "emergency" basis—i.e., suspending the particular facility's permit without a prior hearing. They do not cite the specific facts which they allege suggest an emergency existed with respect to the Dublin Facility. Without this information, the Court cannot determine whether Georgia put into place adequate procedural safeguards to minimize the chance that an erroneous emergency suspension of a permit would occur, and therefore is unable to evaluate whether the post-deprivation remedies provided here were sufficient to satisfy due process.[9] *Compare Powell v. Ga. Dep't of*

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9. Plaintiff argues that the alleged intentional conduct on the part of EPD officials in this case precludes any argument that a pre-deprivation hearing was impracticable. (Pl.'s Resp. to State Defs.' Mot. to Dismiss at 15-16.) In essence, it contends that because the State Defendants allegedly conspired to deprive Plaintiff of its LAS permit, such deprivation was foreseeable and therefore a pre-deprivation hearing could have been provided. (*See id.*) This argument is without merit. In *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), the Supreme

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Human Res., 114 F.3d 1074, 1081-83 (11th Cir.1997) (holding that post-deprivation remedies for deprivation imposed by state social workers were sufficient to satisfy due process where a pre-deprivation hearing before every caseworker decision was not feasible and the State had provided an extensive set of protocols for caseworkers to follow in deciding whether to impose such a deprivation).

The State Defendants also argue that Plaintiff was provided with an adequate state-law remedy in the form

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Court held that unauthorized, intentional conduct on the part of a state actor to deprive a person of liberty or property without a prior hearing does not necessarily give rise to a procedural due process violation. *Hudson* involved a prisoner who alleged that, during a search of his prison cell, a guard deliberately and maliciously destroyed some of his property as part of a "personal vendetta" against the prisoner. *Id.* at 519-20, 522 n. 2. The Court held that the fact that the guard's conduct was intentional and therefore foreseeable to him was "of no consequence" in evaluating whether pre-deprivation process was feasible, since the relevant inquiry is "whether the state is in a position to provide for predeprivation process." *Id.* at 534; *see also Zinermon*, 494 U.S. at 129-30 (discussing *Hudson*). This same principle applies here, where Plaintiff alleges that EPD officials acted pursuant to a long-standing conspiracy to violate its constitutional rights. The proper inquiry is not whether the State Defendants could have foreseen the deprivation and therefore provided pre-deprivation process, but whether Georgia could have provided pre-deprivation process in these circumstances and, if not, whether it put into place adequate procedural safeguards to minimize the chance of an erroneous (or malicious) deprivation.

of a tort claim for damages resulting from the alleged deprivation. (State Defs.' Reply in Supp. of Mot. to Dismiss at 9.) *See generally Cotton v. Jackson*, 216 F.3d 1328, 1331 (11th Cir.2000) ("If adequate state remedies were available but the plaintiff failed to take advantage of them, the plaintiff cannot rely on that failure to claim that the state deprived him of procedural due process."); *Collins v. Walden*, 613 F.Supp. 1306, 1313-14 (N.D.Ga.1985) ("The state remedy need not be identical to, or as extensive as, a remedy for damages under section 1983, but instead need only be sufficient to satisfy the requirements of procedural due process.") (citing *Parratt v. Taylor*, 451 U.S. 527, 544, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)). Specifically, the State Defendants argue that Plaintiff could have asserted a claim for damages against the EPD under the Georgia Tort Claims Act ("GTCA") to recover the $400,000 in damages it claims to have incurred as a result of the Emergency Order. (State Defs.' Reply in Supp. of Mot. to Dismiss at 9) ("[T]he state also provided to [Plaintiff] a post-deprivation remedy for damages under the Georgia Tort Claims Act . . . which [Plaintiff] apparently chose not to use.").

The Court is not persuaded by this argument. First, it was raised for the first time on reply, thereby precluding Plaintiff from addressing whether a claim under the GTCA is an adequate remedy for the alleged deprivation. *See Ga. Dep't of Natural Res.*, 897 F.Supp. at 1471. Second, it is unclear whether the GTCA provides an action for damages under these circumstances. Subject to certain exceptions and limitations, the Act

provides a waiver of the State's sovereign immunity for torts committed by state officers and employees while acting within the scope of their official duties or employment. *See* O.C.G.A. §§ 50-21-20, 50-21-23. One such exception provides that Georgia shall have no liability "for losses resulting from . . . [l]icensing powers or functions, including, but not limited to, the issuance, denial, suspension, or revocation of or the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization." *Id.* at § 50-21-24(9). The State Defendants have not addressed this exception, and it appears to the Court that it may preclude a claim against EPD for damages resulting from the suspension of Plaintiff's LAS permit. *See Ga. Forestry Comm'n v. Canady,* 274 Ga.App. 556, 617 S.E.2d 569, 573 (Ga.Ct.App.2005) (holding that licensing exception set out in O.C.G.A. § 50-21-24(9) precluded liability on the part of a state agency for damages stemming from its decision to issue a permit for the burning of timber land); *Smith v. Dep't of Human Res.*, 257 Ga.App. 33, 570 S.E.2d 337, 340-41 (Ga.Ct.App.2002) (holding that the licensing exception "clearly" exempts the state and its agencies from liability for losses sustained as a result of the revocation of the plaintiff's approval as a Medicaid provider).[10]

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10. The Court notes, however, that the State Defendants' immunity from suit under the GTCA does not necessarily render this state remedy inadequate. *See Rittenhouse v. DeKalb County,* 764 F.2d 1451, 1457-59 (11th Cir.1985) ("We further conclude that the sovereign immunity enjoyed by [the government defendants] do not render [the plaintiff's] state law remedy inadequate. . . ."); (Cont'd)

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Because the Court is without sufficient information to evaluate the feasability of pre-deprivation process or the adequacy of the post-deprivation remedies available to Plaintiff, the State Defendants' motion to dismiss Plaintiff's procedural due process claim with respect to the March 14, 2003 suspension of its LAS permit is DENIED.

d. *Qualified Immunity*

The State Defendants argue they are entitled to qualified immunity with respect to Plaintiff's claims for damages against them in their individual capacities.[11] (State Defs.' Br. in Supp. of Mot. to Dismiss at 11-17.) "Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wood v. Kesler*, 323 F.3d 872, 877 (11th Cir.2003) (citations and quotations omitted). "Questions of qualified immunity should be resolved at

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McCall v. Dep't of Human Res., 176 F.Supp.2d 1355, 1369 n. 6 (M.D.Ga.2001) ("The Court notes that the adequacy of the GTCA is not affected by the possibility that [the defendant county officials] may be entitled to state-law immunity.") (citing *Rittenhouse*, 764 F.2d at 1457-59).

11. It is well settled that qualified immunity does not protect government employees sued in their official capacities or in their individual capacities with respect to claims for injunctive relief. *See Rogers v. Miller*, 57 F.3d 986, 989 n. 4 (11th Cir.1995).

the earliest possible stage in the litigation." *Dalrymple v. Reno*, 334 F.3d 991, 995 (11th Cir.2003). "A district court should therefore grant the defense of qualified immunity on a motion to dismiss if the complaint fails to allege the violation of a clearly established constitutional right." *Id.* (citations and quotations omitted).

The process for evaluating a defense of qualified immunity is well established:

> To be eligible for qualified immunity, the official must first establish that he was performing a "discretionary function" at the time the alleged violation of federal law occurred. Once the official has established that he was engaged in a discretionary function, the plaintiff bears the burden of demonstrating that the official is not entitled to qualified immunity. In order to demonstrate that the official is not entitled to qualified immunity, the plaintiff must show two things: (1) that the defendant has committed a constitutional violation and (2) that the constitutional right the defendant violated was "clearly established" at the time he did it.

Crosby v. Monroe County, 394 F.3d 1328, 1332 (11th Cir.2004). *Cf. Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir.2004) ("[W]e do not just compare the facts of an instant case to prior cases to determine if a right is 'clearly established;' we also assess whether the facts of the instant case fall within statements of general

principle from our precedents."). Here, it is clear the State Defendants were performing discretionary functions at the time the alleged violations of federal law occurred. *See Crosby*, 394 F.3d at 1332 ("To determine whether an official was engaged in a discretionary function, [the court must] consider whether the acts the official undertook 'are of a type that fell within the employee's job responsibilities.' ") (quoting *Holloman*, 370 F.3d at 1265). In addition, the Court already has concluded that Plaintiff states a claim for violation of its equal protection rights and its right to procedural due process. The sole issue with respect to qualified immunity is whether Plaintiff has satisfied its burden of demonstrating that the State Defendants' alleged conduct violated a clearly established constitutional right.

"For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Magluta v. Samples*, 375 F.3d 1269, 1283 (11th Cir.2004) (citing *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)). "The very action in question does not have to have been found unlawful, but in light of pre-existing law the unlawfulness must be apparent." *Magluta*, 375 F.3d at 1283 (citing *Hope*, 536 U.S. at 739). "The salient question is whether the state of the law at the time of the violation gave the officials fair warning that their alleged actions were unconstitutional." *Magluta*, 375 F.3d at 1283 (citing *Hope*, 536 U.S. at 741).

To sustain its burden of demonstrating that the State Defendants' alleged conduct violated a clearly established constitutional right, Plaintiff cites the Court to four Eleventh Circuit cases. (Pl.'s Resp. to State Defs.' Mot. to Dismiss at 20.) Two of these cases—*Olech* and *Executive 100*—concern violations of equal protection rights, and the Court concludes that these cases were sufficient to put a reasonable state official on notice that the conduct alleged here was clearly unlawful. *See Olech*, 528 U.S. at 564-65; *Executive 100*, 922 F.2d at 1541.[12] Accordingly, the State Defendants are not entitled to qualified immunity with respect to Plaintiff's equal protection claim.

With respect to its procedural due process claim, Plaintiff has failed to carry its burden to demonstrate that the State Defendants' alleged conduct violated a clearly established constitutional right. The two cases cited by Plaintiff in support of its arguments concerning procedural due process—*Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir.1982), and *Swint v. City of Wadley*, 51 F.3d 988 (11th Cir.1995)—are not sufficiently similar to this case to provide the State Defendants with notice that their alleged conduct was unlawful.

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12. Indeed, the State Defendants in their reply brief do not challenge that Plaintiff's right to equal protection was clearly established at the time of the alleged conduct and that these cases were sufficient to put the State Defendants on notice that the alleged conduct here was unlawful. (*See* State Defs.' Reply in Supp. of Mot. to Dismiss at 11-13.)

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In *Espanola*, hotel owners brought civil rights claims against the city commissioners, alleging that the commissioners formed a task force of building code inspectors and fire inspectors to conduct frequent inspections of their hotels and to write numerous and burdensome violations of the hotels until they were driven out of business. 690 F.2d at 828. The district court granted summary judgment for the defendants on the basis of qualified immunity. *Id*. The Eleventh Circuit reversed, holding that qualified immunity was inappropriate for a host of reasons, including that the defendants pleaded only absolute immunity, not qualified immunity, and that the defendants failed to establish they were performing a discretionary function at the time of the alleged violation. *Id.* at 830. The court also stated, without citation, that "a conscious attempt to deprive property owners of property without due process of law clearly contravenes established law." *Id.* Aside from the general statement that the right to due process is clearly established-a statement on which it did not substantially rely in reaching its conclusion and on which it did not elaborate-the court in *Espanola* did not address what protections, if any, were necessary to satisfy due process in these circumstances.

In *Swint*, proprietors and patrons of a nightclub alleged that law enforcement officials violated their due process rights by deliberately attempting to drive the club out of business through pretextual law enforcement raids. 51 F.3d at 1001. The district court denied the defendants' motions for summary judgment, finding that qualified immunity was not warranted. *Id.* at 1000-01.

The Eleventh Circuit reversed, holding that it was not clearly established in this circuit at the time of the defendants' conduct that attempts by law enforcement to force citizens out of business through the use of repeated and improperly motivated raids of their business establishments violated the Due Process Clause. *Id.* at 1001. Thus, the court in *Swint* did not purport to establish that a business's protection against repeated and unlawful law enforcement raids is clearly established; rather, the court found that qualified immunity was appropriate because the due process right at issue was not clearly established prior to the defendants' conduct.

Thus, although *Espanola* and *Swint* involve the broad notion of "due process," neither of them addresses the issue at the crux of the procedural due process claim here—whether, under *Matthews v. Eldridge* and its progeny, a pre-deprivation hearing is required before the government may suspend a business's operating permit. In view of the uncertainty regarding whether a pre-deprivation hearing is required under the balancing test set out in *Matthews v. Eldridge*, and the lack of controlling case law addressing this issue in the context of a suspension of a business's operating permit or substantially similar fact pattern, the Court finds that reasonable government officials in the State Defendants' position could have believed their actions to be lawful. *See Powell*, 114 F.3d at 1082 (granting qualified immunity to state officials where the plaintiff failed to demonstrate "that it was clearly established at the time of the [officials'] actions in this case that an additional

predeprivation procedure was feasible"). Accordingly, the State Defendants are entitled to qualified immunity with respect to Plaintiff's claim for damages against them in their individual capacities for their alleged violation of its right to procedural due process.

e. *Abstention*

In addition to its claims for damages, Plaintiff seeks injunctive relief in the form of an order "enjoining Defendants from continued discrimination" (Compl. ¶ 112), and "preclud[ing] Defendants from continuing to violate Plaintiff's procedural due process rights ." (*Id.* at ¶ 116.) The State Defendants argue the Court should abstain from considering these claims for injunctive relief pursuant to the abstention doctrines set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). (State Defs.' Br. in Supp. of Mot. to Dismiss at 17-26.) In essence, they argue that the Court should abstain under *Younger* and *Burford* because the injunctive relief requested by Plaintiff, if granted, will interfere with the ongoing administrative proceeding between Plaintiff and the EPD concerning the Title V permit. (*Id.* at 17-20, 21-26.)

Plaintiff in its response represents to the Court that it "does not seek to enjoin or challenge the final Title V Operating Permit issued by EPD . . . [and] does not ask this Court to force EPD to grant [Plaintiff] a Title V Permit or to dictate the terms of that Permit." (Pl.'s Resp. to State Defs.' Mot. to Dismiss at 21.) In view of

this representation, as well as the Court's rulings with respect to Plaintiff's procedural due process claim,[13] the Court is not persuaded that its consideration of Plaintiff's generalized claims for injunctive relief poses a substantial risk of interference with the ongoing Title V permit proceedings. Accordingly, the State Defendants' request that the Court abstain from hearing Plaintiff's claims for injunctive relief is DENIED.

2. *The East Dublin Defendants' Motion to Dismiss*

The East Dublin Defendants argue Plaintiff's claims against them should be dismissed pursuant to Rule 12(b)(6) because (1) much of the disputed conduct falls outside the two-year statute of limitations for Section 1983 claims; (2) Plaintiff's allegations with respect to conduct occurring within two years of the Complaint are not sufficient to state a claim for violation of its constitutional rights of equal protection or procedural due process; (3) even if these allegations are sufficient to state a claim for violation of a constitutional right, they are insufficient to state a claim against the East Dublin Defendants for conspiracy to violate these rights; and (4) Defendants Gornto and Knight are entitled to qualified immunity with respect to Plaintiff's claims for damages against them. (East Dublin Defs.' Mem. of Law in Supp. of Mot. to Dismiss at 5-23; East Dublin Defs.' Reply in Supp. of Mot. to Dismiss [43] at 2-15.) With

13. The Court concluded that Plaintiff's procedural due process claim was not viable with respect to the Title V permit proceedings. *See* Section II(B)(1)(c)(2), *supra*.

respect to the East Dublin Defendants' first and second arguments for dismissal, the Court already has concluded that Plaintiff's claims are limited to conduct occurring on or after March 11, 2003, and that Plaintiff's allegations are sufficient to state a claim for violation of their constitutional rights of equal protection and procedural due process. *See* Sections II(B)(1)(b), (c), *supra*.[14] Accordingly, the East Dublin Defendants' first and second arguments are accepted in part and denied in part as set forth above with respect to the State Defendants. The Court in this section shall address only the East Dublin Defendants' third and fourth arguments.

a. *Conspiracy*

"To establish a prima facie case of section 1983 conspiracy, a plaintiff must show, among other things,

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14. The only difference in the East Dublin Defendants' first and second arguments for dismissal and those presented by the State Defendants is the East Dublin Defendants' contention that Plaintiff failed to adequately allege a deprivation of a constitutionally protected property interest in connection with its procedural due process claim. (East Dublin Defs.' Mem. of Law in Supp. of Mot. to Dismiss at 6-7.) The Eleventh Circuit has instructed that "no procedural due process claim exists until a sufficiently certain property right under state law is first shown." *Greenbriar Village, L.L.C. v. Mountain Brook, City*, 345 F.3d 1258, 1265 (11th Cir.2003). Here, Plaintiff alleges a protectable interest in its continued operation of the Dublin Facility pursuant to the previously granted LAS permit. (Compl.¶¶ 86, 89-91.) The Court finds that, at this stage of the litigation, these allegations are enough to show a sufficiently certain property right under state law.

that the defendants 'reached an understanding to violate [his] rights.' " *Rowe v. City of Ft. Lauderdale, Fl.*, 279 F.3d 1271, 1283 (11th Cir.2002) (citation omitted); *Bendiburg v. Dempsey*, 909 F.2d 463, 469 (11th Cir.1990) ("[N]othing more than an 'understanding' and 'willful participation' between private and state defendants is necessary to show the kind of joint action that will subject private parties to § 1983 liability."). Although vague and conclusory allegations suggesting a Section 1983 conspiracy are insufficient to withstand a motion to dismiss, *Harvey v. Harvey*, 949 F.2d 1127, 1133 (11th Cir.1992), the plaintiff is not required "to produce a 'smoking gun' to establish the 'understanding' or 'willful participation' required to show a conspiracy. . . ." *Rowe*, 279 F.3d at 1283-84 (citation omitted). It is sufficient if he shows "some evidence of agreement between the defendants." *Rowe*, 279 F.3d at 1283-84. *Cf. Harvey*, 949 F.2d at 1133 ("For purposes of 42 U.S.C. § 1983, the plaintiff must plead in detail, through reference to material facts, the relationship or nature of the conspiracy between the state actor(s) and the private persons."); *GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1370 (11th Cir.1998) (holding that a plaintiff claiming a conspiracy under Section 1983 must make particularized allegations that a conspiracy exists).

In this case, Plaintiff asserts that the East Dublin Defendants conspired with the State Defendants and Laurens County to violate its constitutional rights of equal protection and procedural due process. To survive a motion to dismiss for failure to state a claim, Plaintiff must allege facts sufficient to demonstrate these

defendants reached an understanding to violate its constitutional rights and must plead in detail, through reference to material facts, the nature of the alleged conspiracy between them. *See Rowe*, 279 F.3d at 1283; *GJR Invs.*, 132 F.3d at 1370. Having reviewed the allegations in the Complaint, the Court finds Plaintiff alleges sufficient facts to support its claim that the defendants reached an understanding to violate its rights to equal protection and procedural due process. Plaintiff alleges with the required specificity that (1) beginning in the 1990s, the East Dublin Defendants committed to singling out the Dublin Facility to be shut down; (2) that from 2002 forward, they were in close communication with the State Defendants regarding various strategies for accomplishing this result; and (3) that the East Dublin Defendants and the State Defendants agreed to undertake certain actions in furtherance of their mutual goal, including by providing the EPD or federal government agencies with allegedly false or exaggerated information concerning environmental conditions at the Dublin Facility, suspending Plaintiff's LAS permit for the facility, threatening revocation of and attaching certain conditions to the Title V permit, etc. (*See* Compl. ¶¶ 36-102.) These allegations, which must be taken as true for purposes of the East Dublin Defendants' motion to dismiss, are sufficient to state a Section 1983 claim for conspiracy to violate Plaintiff's constitutional rights. Accordingly, the East Dublin Defendants' motion to

dismiss to Plaintiff's Section 1983 conspiracy claim is DENIED.[15]

b. *Qualified Immunity*

The East Dublin Defendants argue that Defendants Gornto and Knight are entitled to qualified immunity with respect to Plaintiff's claims for damages against them in their individual capacities. (East Dublin Defs.' Mem. of Law in Supp. of Mot. to Dismiss at 17-20.)[16]

15. Ultimately, of course, the evidence may show that the East Dublin Defendants' conduct with respect to the Dublin Facility and their interaction with the State Defendants reflected only a legitimate and well-founded concern for the public health and the environment rather than an understanding to violate Plaintiff's constitutional rights. Because Plaintiff has adequately alleged a Section 1983 conspiracy, however, this issue is not appropriate for resolution on a Rule 12(b)(6) motion. *See Bendiburg*, 909 F.2d at 469 (denying summary judgment on Section 1983 claim against private parties because issues of fact existed regarding the conduct and motivation of the private parties in providing allegedly false information to the government in furtherance of an alleged conspiracy to violate the plaintiff's constitutional rights: "The facts as they develop may well show that all of the [private parties'] representations as to required medical care were accurate, or reasonably thought to be accurate, and the private parties left it to the state actors to legally obtain the consent that they sought. This cannot be decided on summary judgment, however, as there are issues of fact concerning the emergency requirement of the recommended medical procedure.").

16. Although Defendant Knight appears to be an attorney in private practice in Dublin, Georgia, Plaintiff alleges that at (Cont'd)

Plaintiff opposes qualified immunity for Defendants Gornto and Knight on the same grounds that it opposed qualified immunity for the State Defendants, namely, that (1) the East Dublin Defendants did not demonstrate that Defendants Gornto and Knight were performing discretionary functions at the time of the alleged violations of Plaintiff's constitutional rights; and (2) that their alleged conduct violated a clearly established constitutional right. (Pl.'s Resp. to East Dublin Defs.' Mot. to Dismiss at 24-25.) To support its argument that Defendants Gornto and Knight's alleged conduct violated clearly established constitutional rights, Plaintiff again relies on *Olech* and *Executive 100* with respect to its equal protection claim, and *Espanola* and *Swint* with respect to its procedural due process claim. (*Id.* at 25.) For the reasons stated above regarding the State Defendants, the Court concludes that Defendants Gornto and Knight are entitled to qualified immunity with

(Cont'd)

all times relevant to this action he acted under color of state law as special counsel to Defendants City of East Dublin and Laurens County and that his alleged conduct herein was undertaken in furtherance of this engagement. (*See* Compl. ¶ 10.) As such, Plaintiff does not dispute that he is entitled to assert the defense of qualified immunity. (Pl.'s Resp. to East Dublin Defs.' Mot. to Dismiss [30] at 24-25.) *See generally Burrell v. Bd. of Trs. of Ga. Military Coll.*, 970 F.2d 785, 795-96 (11th Cir.1992) (citing with approval cases from other circuits holding that "the qualified immunity doctrine protects a private defendant who acted in accordance with the duties imposed by a government contract, performed a governmental function, and is sued solely on the basis of acts performed pursuant to the contract") (citation omitted).

respect to Plaintiff's procedural due process claims. *See* Section II(B)(1)(d), *supra.* Qualified immunity for these defendants is denied, however, with respect to Plaintiff's equal protection claim. *See id.*

C. Defendant Laurens County's Motion for Judgment on the Pleadings

"Judgment on the pleadings under Rule 12(c) is appropriate when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." *Horsley v. Rivera,* 292 F.3d 695, 700 (11th Cir.2002) (citing *Hawthorne v. Mac Adjustment, Inc.,* 140 F.3d 1367, 1370 (11th Cir.1998)). "If upon reviewing the pleadings it is clear that the plaintiff would not be entitled to relief under any set of facts that could be proved consistent with the allegations, the court should dismiss the complaint." *Horsley,* 292 F.3d at 700 (citing *White v. Lemacks,* 183 F.3d 1253, 1255 (11th Cir.1999)).

Defendant Laurens County moves for judgment on the pleadings on Plaintiff's claims against it on the grounds that (1) claims based on alleged conduct occurring prior to March 11, 2003, are barred by the statute of limitations; and (2) that Plaintiff's claims with respect to post-March 11, 2003 conduct fail because Defendant Laurens County's alleged conduct was not the legal cause of Plaintiff's damages under Section 1983. (Def. Laurens County's Br. in Supp. of Mot. for J. on Pleadings at 7-12.) The Court already has determined that Plaintiff's claims based on pre-March 11, 2003

conduct are barred by the statute of limitations, *see* Section II(B)(1)(b), *supra*, and Defendant Laurens County's motion for judgment on the pleadings with respect to these claims is GRANTED. The sole remaining issue is whether Plaintiff's claims based on post-March 11, 2003 conduct fails as a matter of law because Defendant Laurens County's alleged conduct was not the legal cause of its injuries.

Defendant Laurens County bases its legal causation argument on *Dixon v. Burke County, Ga.*, 303 F.3d 1271 (11th Cir.2002). In *Dixon*, an unsuccessful candidate for a county board of education vacancy brought a Section 1983 equal protection claim against the county, the district attorney, and the foreman of the grand jury that had been charged with providing recommendations for filling the vacancy. 303 F.3d at 1273-74.[17] The plaintiff alleged she was denied the position because of her gender, citing comments by the district attorney to the grand jury that they should select someone of the same race and gender as the previous board member, a white male. *Id.* The district court granted summary judgment for the district attorney, holding that the plaintiff could not show the requisite causation because the vote of nineteen "independent" grand jurors severed the chain of liability between the district attorney's comments and the ultimate decision not to select the plaintiff for the vacancy. *Id.* The Eleventh Circuit affirmed, holding that a "causal relation does not exist when the continuum

17. Pursuant to the county's procedure for filling board vacancies, the grand jury's recommendation was subsequently approved by a state-court judge.

between Defendant's action and the ultimate harm is occupied by the conduct of deliberative and autonomous decision-makers." *Id.* at 1275. The court held that in this particular case "[t]he causal connection between [the district attorney's] words and [the alleged discriminatory action] is severed by the intervening free, independent, and volitional acts of the Grand Jury and the state Judge." *Id.*

Dixon and its reasoning do not apply here. Unlike *Dixon,* this case is before the Court on a motion for judgment on the pleadings, not a motion for summary judgment. The standards for resolving these two types of motions differ significantly. *Compare Horsley,* 292 F.3d at 700, *with Graham v. State Farm Mut. Ins. Co.,* 193 F.3d 1274, 1282 (11th Cir.1999). The differences in these standards are material here, because the success of Defendant Laurens County's legal causation argument turns on factual issues such as the independence and autonomous nature of the decisionmaking process employed by the State Defendants in imposing the alleged unconstitutional deprivations. At this stage of the litigation, the Court cannot assume the State Defendants engaged in free, independent decisionmaking regarding the alleged deprivations, thus severing the causal connection between Defendant Laurens County's conduct and the alleged unconstitutional conduct. Instead, the Court must accept as true the specific factual allegations set out in the Complaint, which in this case aver that Defendant Laurens County reached an understanding with the State Defendants to violate Plaintiff's constitutional

rights of equal protection and procedural due process.[18] Accordingly, Defendant Laurens County's motion for judgment on the pleadings on these claims is DENIED.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that the East Dublin Defendants' Motion to Transfer [7] and the State Defendants' Motion to Transfer [48] are DENIED.

IT IS FURTHER ORDERED that the State Defendants' Motion to Dismiss [24], the East Dublin Defendants' Motion to Dismiss [8] and Defendant Laurens County's Motion for Judgment on the Pleadings

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18. As stated above, a plaintiff seeking to recover against a defendant on a theory of Section 1983 conspiracy must show, among other things, that "the defendants 'reached an understanding to violate [his] rights.' " *Rowe*, 279 F.3d at 1283 (citation omitted); *Bendiburg*, 909 F.2d at 469 ("[N]othing more than an 'understanding' and 'willful participation' between private and state defendants is necessary to show the kind of joint action that will subject private parties to § 1983 liability."). Here, Plaintiff alleges that Defendant Knight, acting on behalf of Defendants City of East Dublin and Laurens County, conspired with the State Defendants to violate Plaintiff's constitutional rights of equal protection and procedural due process. As stated above with respect to the East Dublin Defendants, the Court finds Plaintiff alleges a Section 1983 conspiracy among these defendants with sufficient factual specificity to survive a Rule 12 motion. *See* Section II(B)(2)(a), *supra*.

[10] are **GRANTED IN PART** and **DENIED IN PART** as set out above in Sections II(B)(1), (2) and II(C), respectively.

SO ORDERED, this 23rd day of March, 2006.

s/ William S. Duffey
WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR PANEL REHEARING AND REHEARING *EN BANC* FILED NOVEMBER 13, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-12370-AA

GRIFFIN INDUSTRIES, INC.,

Plaintiff-Appellee,

versus

CAROL COUCH, in her official capacity as Director of the Georgia Environmental Protection Division of the Georgia Department of Natural Resources, et al.,

Defendants,

TOMMY IRVIN,
in his official capacity as Commissioner of the Georgia Department of Agriculture and
in his individual capacity,
LEE MYERS,
in his official capacity as Commissioner of the Georgia Department of Agriculture and
in his individual capacity,
HAROLD REHEIS,
in his individual capacity,

Appendix C

DUBOSE PORTER,
in his individual capacity,
GEORGE GORNTO,
in his individual capacity
JOSHUA E. KIGHT,
in his individual capacity,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: HULL and MARCUS, Circuit Judges, and BARZILAY, *Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

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* Honorable Judith M. Barzilay, Judge, United States Court of International Trade, sitting by designation.

APPENDIX D — REVELANT CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Const. Amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.